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# A study of fee-charging McKenzie Friends and their work in private family law cases

Leanne Smith, Emma Hitchings and Mark Sefton

June 2017



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## Table of Contents

|   |           |
|---|-----------|
| <b>Acknowledgements.....</b>  | <b>2</b>  |
| <b>The authors.....</b>   | <b>2</b>  |
| <b>1. Background to the study.....</b>                                    | <b>5</b>  |
| <b>1.1 The context .....</b>  | <b>5</b>  |
| <b>1.2 The study .....</b>  | <b>9</b>  |
| 1.2.1 Component 1 – Freestanding interviews with McKenzie Friends.....    | 10        |
| 1.2.2 Component 2 – Interviews with LiP clients of McKenzie Friends ..... | 10        |
| 1.2.3 Component 3 – Court-based observation and linked interviews.....    | 11        |
| 1.2.4 Access and ethics .....   | 12        |
| 1.2.5 A note on analysis and terminology.....                             | 12        |
| <b>2. McKenzie Friends and their clients .....</b>                        | <b>14</b> |
| <b>2.1 The McKenzie Friend interview sample .....</b>                     | <b>14</b> |
| 2.1.1 Estimating the number of fee charging McKenzie Friends .....        | 14        |
| 2.1.2 Characteristics of McKenzie Friends included in the research .....  | 15        |
| <b>2.2 A typology of fee-charging McKenzie Friends .....</b>              | <b>16</b> |
| 2.1.1. The business opportunist .....                                     | 17        |
| 2.1.2. The redirected specialist.....                                     | 18        |
| 2.1.3. Good Samaritan.....  | 19        |
| 2.1.4. The Family Justice Crusader .....                                  | 20        |
| 2.1.5. The ‘rogue’ .....  | 21        |
| <b>2.3 Business Practices of McKenzie Friends.....</b>                    | <b>23</b> |
| 2.3.1 Business structures .....   | 23        |
| 2.3.2 Terms and conditions of business.....                               | 24        |
| 2.3.3 Fee structures .....  | 25        |
| 2.3.4 Professional indemnity insurance (PII) .....                        | 26        |
| 2.3.5 Data protection issues .....  | 27        |
| 2.3.6 Complaints procedures .....   | 28        |
| 2.3.7 Obtaining clients .....   | 29        |
| 2.3.8 Training and professional development .....                         | 30        |
| 2.3.9 Working from home .....   | 32        |
| 2.3.10 Ethical dilemmas/issues for the McKenzie Friend .....              | 33        |
| <b>2.4 The clients of fee-charging McKenzie Friends.....</b>              | <b>34</b> |
| 2.4.1. Who are they?.....   | 34        |
| 2.4.2 Reported reasons for using use McKenzie Friends?.....               | 36        |
| <b>2.5 Conclusions.....</b>   | <b>40</b> |
| <b>Key findings .....</b>   | <b>41</b> |
| <b>3. The hidden depths: work done outside of court .....</b>             | <b>42</b> |
| <b>3.1. The scope of ‘the extended role’ .....</b>                        | <b>42</b> |
| 3.1.1 Paperwork.....  | 43        |
| 3.1.2 Managing expectations.....  | 45        |
| 3.1.3 Supporting settlement.....  | 46        |
| 3.1.4 Legal advice .....  | 47        |

|  |    |
|--|----|
| <i>The grey area</i> .....   | 49 |
| 3.1.5 Avoiding undertaking the conduct of litigation .....                                 | 50 |
| 3.2 Out-of-court tasks and McKenzie Friend competence .....                                | 52 |
| 3.2.1 The 'vignette' exercise .....  | 54 |
| 3.3 Conclusion .....   | 56 |
| Key findings .....   | 58 |
| 4. The tip of the iceberg: In-court activity for the fee-charging McKenzie Friend .        | 59 |
| 4.1 Fee-charging McKenzie Friends at court .....   | 59 |
| 4.1.1 Identifying the fee-charging McKenzie Friend at court.....                           | 59 |
| 4.1.2 The prevalence of fee-charging McKenzie Friends in private family law hearings ..... | 62 |
| 4.2. Support at court - how helpful were McKenzie Friends? .....                           | 63 |
| 4.2.1 Rights of audience.....  | 63 |
| a. The restrained approach: McKenzie Friends as coaches .....                              | 66 |
| <i>McKenzie Friend use of direct access barristers</i> .....                               | 67 |
| b. The pragmatic approach: the McKenzie Friend as understudy .....                         | 68 |
| c. The Difficult few: rights of audience and McKenzie Friends as frustrated actors. ...    | 70 |
| <i>A note on cross examination</i> .....   | 71 |
| 4.2.2 Moral and practical support .....  | 72 |
| a. Helping the litigant to participate effectively .....                                   | 72 |
| b. Drafting orders .....   | 73 |
| c. Negotiation and settlement activity .....   | 74 |
| d. Negotiation as a reserved activity? .....   | 76 |
| 4.3 Miscellaneous observations.....  | 77 |
| 4.4 Conclusions.....   | 78 |
| Key findings.....  | 80 |
| 5. Conclusions .....   | 81 |
| 5.1 The good, the bad, and the hitherto unknown .....                                      | 81 |
| 5.2 Some thoughts on the regulatory ramifications of the research .....                    | 84 |
| 5.2.1 The case for excluding fee-charging McKenzie Friends from courts .....               | 84 |
| 5.2.2 Mind the regulatory gap .....  | 86 |
| References .....   | 88 |
| Glossary .....   | 92 |
| Appendix 1 .....   | 95 |
| Vignette used in freestanding interviews with McKenzie Friends.....                        | 95 |

# 1. Background to the study

## 1.1 The context

McKenzie Friends are a long-standing feature of our civil and family justice system. The term ‘McKenzie Friend’ originates from a 1970 Court of Appeal case<sup>1</sup> in which it was confirmed that litigants have a (rebuttable) right to receive lay assistance in the course of representing themselves. An array of later cases elaborated on the content and extent of that right and the common law principles governing its exercise were eventually consolidated into Practice Guidance, the most recent version being published in 2010.<sup>2</sup>

The lay assistance envisaged by *McKenzie v McKenzie* was assistance provided within the court environment and that position is reflected in the Practice Guidance, which states that: ‘McKenzie Friends may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case’.<sup>3</sup>

Although the traditional type of McKenzie Friend is still very much in evidence in our courts,<sup>4</sup> the reach of the title has extended to describe the role of a very different type of supporter, namely one who provides ‘lay assistance’ on a regular basis and additionally undertakes a range of ancillary tasks outside of the court but in connection with court proceedings.<sup>5</sup> In a further augmentation of the original role, it has been reported that McKenzie Friends increasingly seek rights of audience.<sup>6</sup> But it is not just the scope of the role that has altered; the people playing the role have changed too. As originally conceived, the lay support of McKenzie Friends was – almost by definition, being provided on a ‘friendly’ basis – unremunerated. There has never been anything to prevent the support being remunerated (indeed the possibility of it being so is implicitly acknowledged in the 2010 Practice Guidance)<sup>7</sup> and the existence of McKenzie Friends who provide frequent support on a fee-charging basis has been known for

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<sup>1</sup> *McKenzie v McKenzie* [1970] 3 W.L.R. 472

<sup>2</sup> Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WR 1881. See also the helpful summary of the expected content of lay assistance provided by the Judicial Working Group on Litigants in Person Report (Judiciary of England and Wales, July 2013) as someone attending court ‘as a friend of a litigant in person to take notes, quietly to make suggestions and to give advice’ (see para 6.4).

<sup>3</sup> *Ibid*, at para 3.

<sup>4</sup> In a study comprising 150 observations of private family cases conducted prior to the legal aid reforms in April 2013, Trinder et al observed 21 individuals providing informal, unremunerated support in the court room. See L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, Litigants in person in private family law cases (Ministry of Justice Analytical Series 2014).

<sup>5</sup> This ‘extended role’ has been described by the Legal Services Consumer Panel: Fee-Charging McKenzie Friends (April 2014). Interestingly our experience of conducting research in the family courts suggests that the term ‘McKenzie Friend’ is far less likely to be used by litigants, supporters or court staff to describe the informal support provided by a friend or family member. Neither is it normally used to describe the more structured and visible support provided by, for example, a Personal Support Unit supporter or a student law clinic representative. All this suggests that the term McKenzie Friend is increasingly used more often in connection with those playing the ‘extended role’ than those playing the traditional role.

<sup>6</sup> See chapter 4 for more detail on this point.

<sup>7</sup> Above, n 2, at paras 27-30. The position in Scotland is different, as detailed in n 19, below.

decades.<sup>8</sup> However, anecdotal evidence that fee-charging McKenzie Friends are increasingly prevalent has prompted numerous expressions of concern.

In 2011, the Civil Justice Council took the view that ‘It will become more important to ensure that the approach to McKenzie Friends is one of readiness to welcome and value the contribution that some can make rather than one of over-caution about the harm that some can do’.<sup>9</sup> They said little on the subject of fee-charging McKenzie Friends generally, but clearly considered the idea that paid McKenzie Friends should secure rights of audience to be problematic, noting that ‘it is to be hoped that courts would be very resistant to allowing a right of audience to a McKenzie friend who was taking payment’.<sup>10</sup>

The Civil Justice Council did not expressly articulate the reason for their objection on this point, but it can reasonably be inferred that the objection stems from the fact that rights of audience are a reserved activity under the Legal Services Act 2007. As such, they are in theory supposed only to be exercised by those subject to the regulatory oversight of the relevant professional bodies (with all the training, registration and insurance costs that entails for professionals exercising them). Under the terms of the legislation, judges retain a residual discretion to confer rights of audience on unqualified and unregulated individuals for the purposes of particular proceedings.<sup>11</sup> But, while it is one thing to permit a friend or family member to speak on behalf of a struggling litigant in person on a one-off basis, it is arguably quite another for someone to be permitted to exercise rights of audience repeatedly, for a fee. As the current Practice Guidance states, the grant of rights of audience to fee-charging McKenzie Friends on anything other than an exceptional basis would ‘tend to subvert the will of Parliament’ as expressed in the Legal Services Act.<sup>12</sup>

In a 2014 research study, the Legal Services Consumer Panel (LSCP) set out the myriad reasons for concern about the work of fee-charging McKenzie Friends as unregulated providers of legal services with access to the courts. The concerns – some explicit and some implicit in the LSCP’s report - include: the risk of poor advice, combined with lack of regulatory protections for those who use McKenzie Friends; the potential threat to the efficient administration of justice (due to inexperience, lack of knowledge or obstructive behaviour); and the apparent prevalence of agenda-driven McKenzie Friends whose personal agendas are not moderated by a duty to their clients or to the courts.<sup>13</sup> Running counter to these concerns, the LSCP identified reasons to be more broadly tolerant of the existence of fee-charging McKenzie Friends. Foremost among these are the benefits of promoting consumer choice and the increased opportunities to obtain access to justice that the existence of cheap, unregulated advice might afford, especially for those who might not otherwise be able to afford help. The latter consideration has assumed particular importance following the withdrawal of legal aid

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<sup>8</sup> The case of *R v Bow County Court, ex parte Pelling* [1999] 2 All ER 583, for example, concerned an experienced McKenzie Friend who had been providing services for a fee for several years.

<sup>9</sup> Civil Justice Council, *Access to Justice for Litigants in Person: A report and series of recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011), at para 145.

<sup>10</sup> *Ibid*, para 146

<sup>11</sup> Schedule 3, paragraph 1(2) Legal Services Act 2007.

<sup>12</sup> Above, n 2, para 23.

<sup>13</sup> LSCP (2014), above n 5. See in particular chapter 4.

for, among other things, most private law family disputes through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Unfortunately, a dearth of research covering the work of fee-charging McKenzie Friends means there is a thin evidence base on which informed judgements about the relative weight of the threats and opportunities presented by this emerging strand of unregulated legal services might be built. The LSCP research of course made some contribution to building the evidence. Following an examination of McKenzie Friend websites, focus group interviews with and calls for evidence from stakeholders (such as judges), and interviews with McKenzie Friends, their report was relatively sanguine about fee-charging McKenzie Friends, concluding that there was little evidence to substantiate concerns about the threats they might pose and that they ought to be accepted 'as a legitimate feature of the evolving legal services market'.<sup>14</sup> They suggested that a self-regulatory body ought to be established to minimise the potential for McKenzie Friend practices to have negative impact.<sup>15</sup>

The LSCP study was useful in canvassing the issue of fee-charging McKenzie Friends and in bringing some evidence to bear on it. However, the report has been insufficient to substantiate or dispel concerns about the work of fee-charging McKenzie Friends. The research was small-scale and, as is acknowledged in the report, limited in its scope. It was therefore unable to quantify the levels of risk posed by the absence or presence of fee-charging McKenzie Friends. From the report itself, it is difficult to judge whether or not the conclusions presented can be supported by the evidence; very little information about the data or approach to analysis is included in the report and the sanguine tone of the conclusions contrasts notably with some of the presented case studies of problematic McKenzie Friend experiences. In any event, the study did not elicit data from users of McKenzie Friends, a problematic gap that is acknowledged in the report.<sup>16</sup> Neither did it yield much independent information on the nature or quality of the work done by paid McKenzie Friends, being based largely on McKenzie Friends' own accounts of their work supplemented by anecdotal evidence submitted by legal professionals and Citizens Advice Bureaux, amongst others.

On these latter points a study of litigants in person in private family law cases by Trinder et al, published almost contemporaneously with the LSCP report, highlighted concerns (it should be noted here that each member of the team involved in the current project was involved in the Trinder et al study). The study encompassed observations of three hearings involving paid McKenzie Friends and found the work of the McKenzie Friend to be extremely positive in one case but concerning in the other two.<sup>17</sup> With reference to the protection of litigants using McKenzie Friends and to the efficient administration of justice, Trinder et al's report concluded that it was hard to discern any 'added value' from paid McKenzie Friends as compared with friends or family members. Trinder et al's research was intensive, comprising observation of a case hearing, combined with follow-up interviews with the litigant, McKenzie Friend and involved legal professionals, and scrutiny of the relevant court case file. Nonetheless, the conclusions on fee-charging McKenzie Friends are based on a very small sample and,

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<sup>14</sup> LSCP, above n 5, para 5.7.

<sup>15</sup> Ibid, paras 6.10-6.13.

<sup>16</sup> Ibid, para 2.10

<sup>17</sup> Trinder et al, above n 4, p 97.



although they raise doubts about the LSCP's conclusions, they can only be relied upon to a limited extent.

Since publication of the LSCP report and Trinder et al's study, an effort has been made to respond to the former's recommendation that paid McKenzie Friends should self-regulate. The Society of Professional McKenzie Friends was established in 2014 but thus far its existence has not been sufficient to allay concerns about the work of paid McKenzie Friends. Indeed, the Lord Chief Justice's recent consultation paper on McKenzie Friends sought views on a proposal to:

... prohibit recovery of expenses and fees incurred by McKenzie Friends... through providing that the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration.<sup>18</sup>

The proposal references recent changes to court rules in Scotland that prohibit the charging of fees for the provision of lay support in courts.<sup>19</sup> Meanwhile, recent reports by the Competition and Markets Authority (CMA)<sup>20</sup> and the Legal Services Board (LSB)<sup>21</sup> have touched upon the issue of unregulated legal services, including those provided by McKenzie Friends. Those reports are in one sense true to the spirit of the LSCP report, exhibiting openness to the prospect of emerging unregulated legal services and the potential for them to be of benefit to consumers of legal services. However, they have not been dismissive of concerns about the need for greater consumer protection against inadequate service providers, with the CMA presenting a case for extending consumer protections to the users of unregulated legal services. The CMA also recommended a review of the regulatory framework for legal services, noting the potential for 'poor alignment between risk and the scope of the reserved legal activities' to result in 'consumer detriment as the proportion of unauthorised persons operating in the legal services sector increases'.<sup>22</sup>

In terms of bolstering the evidence base on the work of McKenzie Friends, the CMA and LSB reports do little; neither directly examined the work that they do and each encountered only a very small number of fee-charging McKenzie Friends.<sup>23</sup> However, some support for the possibility that fee-charging McKenzie Friends might be worth embracing can be drawn from research that looks more broadly at the quality of advice

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<sup>18</sup> Lord Chief Justice of England and Wales, Reforming the courts' approach to McKenzie Friends: a consultation (2016), para 4.21. Discussion at pp 19-21. There is some ambiguity about the intended scope of the proposal resulting from the precise wording and detail contained here and later in the document. This is discussed further later in this report.

<sup>19</sup> Act of Sederunt (Sheriff Court Rules) (Lay Representation) 2013 and Act of Sederunt (Rules of the Court of Session amendment No.3)(Miscellaneous) 2012 (SSI 2012/189). Useful discussion of the complex rules related to lay support and representation in Scotland can be found in: Scottish Civil Justice Council, Access to Justice Literature Review: Party litigants and the support available to them (December 2014).

<sup>20</sup> Competition and Markets Authority, Legal services market study: Final report (December 2016).

<sup>21</sup> Legal Services Board, Mapping of for profit unregulated legal services providers (June 2016).

<sup>22</sup> CMA, above n 20, p 13.

<sup>23</sup> The CMA indicates that fewer than 1% of 750 surveyed individuals reported paying a McKenzie Friend for legal services (above, n 20, p 38). The LSB found only 4 instances of fee-charging McKenzie Friends being used as the main provider of assistance with a legal problem, out of a sample of 5,512 (above, n 21, p 12).

provided by non-lawyers. More than one study comparing advice given by lawyers and non-lawyers in different sectors has concluded that the latter are capable of providing services that are as valuable, even sometimes more valuable, than those provided by the former.<sup>24</sup> Comparisons may depend on the levels of specialisation by the lawyers and non-lawyers and the approach of the courts they are operating in.<sup>25</sup> Such research gives cause to pause for thought before assuming that all fee-charging McKenzie Friends must be bad. Such pause should also be prompted by the fact that a majority of fee-charging McKenzie Friend work appears to be focused on private family law proceedings.<sup>26</sup> This is an area in which unmet need is high, and not just following the implementation of LASPO; a high proportion of litigants in person have always featured in family cases. Compounding the unmet need for legal advice and representation is the striking prevalence of other problems, such as mental health issues and financial struggles,<sup>27</sup> among adults experiencing family breakdown. Trinder et al's study also found high rates of personal vulnerability among the population of litigants in person in the family courts.<sup>28</sup>

The debate over fee-charging McKenzie Friends remains intense. In the lifecycle of this research project legal and general media abounded with stories of 'rogue' examples, or about the general threats that the encroachment of unqualified and unregulated advisers into the legal services sector poses for the legal professions and the risks for the administration of justice. But this is a debate in which opinion and anecdote are plentiful and facts and evidence are scarce and the case for further research is pressing. Against this backdrop, this report presents the findings of a qualitative study of the work of fee-charging McKenzie Friends in private family law cases, with a view to facilitating more informed discussion on the way forward.

## 1.2 The study

The aims of the study were to increase understanding of the work that fee-charging McKenzie Friends do and how they approach their work. We particularly aimed to explore two knowledge gaps that existing research had not addressed: first, the lack of data on the perspectives and experiences of the clients of McKenzie Friends; and secondly the lack of information on how McKenzie Friends approach work both in and outside of the court environment.

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<sup>24</sup> See in particular R Moorhead, A Paterson and A Sherr, 'Contesting professionalism: Legal aid and non-lawyers in England and Wales' [2003] 37 Law and Society Review 765. For a further example see Rebecca L. Sandefur and Thomas M. Clarke, *Roles Beyond Lawyers: Summary Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, (December 2016).

<sup>25</sup> See, further, D James Greiner and Cassandra Wolos Pattanayak, 'Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?' [2012] Yale Law Journal 2118; D James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy, 'The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future' (2012) 126 Harv. L. Rev. 901.

<sup>26</sup> As noted in the LSCP study, above n 5. A quick websearch for paid McKenzie Friends, or a glance at the members of the Society of Professional McKenzie Friends supports the LSCP's evidence, and the anecdotal evidence, that this is the case.

<sup>27</sup> 47% and 54% respectively according to the most recent data. R Franklin, T Budd, R Berrill and M Willoughby, *Key findings from the legal problem and resolution survey, 2014-15* (Ministry of Justice Analytical Series, 2017).

<sup>28</sup> Trinder et al, above n 4, chapter 2.

The research study was qualitative and aimed to build insight into a range of practices, experiences and perspectives rather than to provide quantitative data that might inform assessment of the quality of the work done by McKenzie Friends with reference to specific benchmarks or variables. The findings are based on a relatively small-scale, purposively selected sample.

There were three components to the study.

### **1.2.1 Component 1 – Freestanding interviews with McKenzie Friends**

This stage of the research consisted of 20 semi-structured interviews with fee-charging McKenzie Friends. The interviews lasted between 1 and 2 hours and, for the most part, were conducted in person. The interview schedule covered general aspects of the McKenzie Friend's background and working practices, a detailed discussion of the work done in their most recently concluded case, and a response to a short vignette. The vignette was designed to explore the way in which interviewees might approach advice and procedure in a standard private children case (see appendix 1).

The interview sample was not randomly generated (and indeed, given the very small number of fee-charging McKenzie Friends in England and Wales<sup>29</sup> and the lack of any sampling frame, it could not be). Rather, the interviewees were selected purposively with efforts made to ensure balanced representation of a range of characteristics (further details are given in chapter 2). A list of potential participants was initially drawn up from details of fee-charging McKenzie Friends published on a number of directories,<sup>30</sup> as well as around 20 websites promoting such McKenzie Friend services, that were identified by the researchers. Those on the list were invited by letter and/or email to participate in an interview in waves until the target number of interviews had been secured. Five McKenzie Friends either declined to be interviewed or failed to respond to interview requests.

### **1.2.2 Component 2 – Interviews with LiP clients of McKenzie Friends**

We recruited 20 clients of fee-charging McKenzie friends for short telephone interviews. These interviews lasted approximately 30 minutes and were designed to elicit responses to questions focusing on: reasons for choosing to use a fee-charging McKenzie Friend; understanding and expectations of the McKenzie Friend role; what the McKenzie Friend did; and the amount spent on the services. Originally we attempted to recruit the sample by leaving information leaflets and posters at Personal Support Units and Citizens Advice Bureaux and with ushers/on noticeboards at family courts. Potential participants were invited to contact one of the research team by email or telephone.

This strategy yielded only one interviewee. In the end, all the other interviewees were recruited following a notice about the research being circulated via the mailing lists and/or social media accounts of OnePlusOne, Only Mums and Only Dads, and the Pink Tape legal blog. Potential participants were asked to click on a link and diverted to a project webpage giving details about the project and explaining how to contact the

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<sup>29</sup> See chapter 4 of the report for more detail on this.

<sup>30</sup> The directories used included those published by the Society of Professional McKenzie Friends, Families Need Fathers, Independent Network of McKenzie Friends and [McKenzieFriends.org.uk](http://McKenzieFriends.org.uk).

researchers. In spite of our efforts to generate a sample using neutral referral agencies, and in spite of the fact that the social media requests were widely dispersed (thanks to Twitter), few of those responding to our request came via those agencies. The vast majority of our sample was generated from sources that would be expected to have a pro fee-charging McKenzie Friend leaning (i.e. emails from individual McKenzie Friends notifying their clients of the study and in one instance asking them to ‘participate to fight the ban on McKenzie Friends’, or emails from organisations closely connected with fee-charging McKenzie Friends). We did not proactively seek the assistance of those sources in generating a sample, but it was an inevitable consequence of the use of social media that they would pick up the request.

Not only is our client sample self-selecting therefore, but it is also likely to be skewed towards those with broadly positive experiences of fee-charging McKenzie Friends. The sample is useful for providing insight into what some litigants like about fee-charging McKenzie Friends, and why they used them instead of lawyers. It also adds a further layer to our data on what fee-charging McKenzie Friends actually do and how they approach their work. What this sample does not do, is indicate how widespread satisfaction or dissatisfaction with services provided by fee-charging McKenzie Friends might be.

### **1.2.3 Component 3 – Court-based observation and linked interviews**

To add insight into what fee-charging McKenzie Friends actually do and their impact on court hearings, we sought to observe their work in the court setting directly, by obtaining permission to sit in on private family law hearings and take notes about the proceedings. Where possible, short follow-up interviews were conducted (subject to consent and logistical feasibility) with any or all of: the fee-charging McKenzie Friend; client/litigant in person; and any other party or lawyer involved in the case. The aim was to sample a minimum of 10 case hearings and obtain 25 linked interviews.

The case observation sample was drawn from five designated family courts, purposively selected on the basis of their high volume of private family law cases and accessibility to the research team. A member of the research team was present at one of these courts on 34 days between August and November 2016. Out of 846 private family law cases listed on those court observation days, 14 cases were identified as involving a paid McKenzie Friend and permission to observe was granted in seven cases. The research team was able to obtain 14 linked interviews.<sup>31</sup>

During each hearing observation, the researcher made hand-written notes addressing topics such as: the roles played by the McKenzie Friend, the LiP, other party and any lawyer, including approaches to rights of audience; the behaviour and demeanour of the McKenzie Friend and their LiP client; aspects of the McKenzie Friend’s contribution that appeared positive or negative; aspects of the hearing in respect of which the McKenzie Friend and their LiP client appeared to struggle with or cope well with. Following the hearing, where possible, the researcher had an informal conversation with the judicial officer asking to what extent the hearing observed was typical of hearings involving

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<sup>31</sup> From the observation linked interviews, there are six litigant in person clients of McKenzie Friends; five McKenzie Friends (one of whom was included in our freestanding interview sample); two other party interviews and one interview with the other party’s lawyer.

McKenzie Friends that they had experienced. The researcher took handwritten notes of any response.

#### **1.2.4 Access and ethics**

Approval for the study as a whole was obtained from Cardiff School of Law and Politics Research Ethics Committee. Permission to conduct the court observation stage of the research (including a Privileged Access Agreement) was granted through the HMCTS Data Access Panel and the President of the Family Division.

#### **1.2.5 A note on analysis and terminology**

Our data took the form of qualitative interview transcriptions and fieldwork notes. It was analysed using an inductive thematic approach. It should be noted that this research was not designed to measure the quality of the work done by fee-charging McKenzie Friends against the work done by lawyers. Many useful studies have been done comparing the work done by lawyers and non-lawyers but those studies required high resources and compared performance on similar tasks. One of the objectives of the present research was to find out more about what tasks McKenzie Friends actually perform, since there is little evidence on the extent to which they replicate the work usually done by lawyers or provide different types of support. As such, this study was designed without knowledge of whether, and if so how, the work done by lawyers and by fee-charging McKenzie Friends would actually be comparable. In any event, the research team's view is that, at this stage, the key question is not whether fee-charging McKenzie Friends provide services that can be approximated in nature and quality with those provided by lawyers to represented litigants. Such a question runs the risk of implicitly reproducing the very assumption that research on fee-charging McKenzie Friends should probe – namely, that only the model of legal services traditionally provided by solicitors and barristers is valuable. Rather, the key question is whether fee-charging McKenzie Friends provide services that are valuable to litigants in person. A related concern is whether they are in any way harmful to the administration of justice. The data yielded by this study provides useful insights on both these points, though it does not provide a basis from which the respective values and risks of using McKenzie Friends can be clearly delineated or quantified. Should it transpire that fee-charging McKenzie Friends are indeed replicating, or claiming to be replicating, the work done by lawyers, a comparative study would be useful.

Fee-charging McKenzie Friends are a relatively small population so, to protect the anonymity of those involved in this study, no identifiers are attached to the data used in this report. Throughout, we use gender-neutral terms in reference to study participants, and quotes from McKenzie Friend or client interviews are simply marked as coming from a 'McKenzie Friend/client interview', or 'observation linked McKenzie Friend/client interview'. Due to the small sample size and the associated risk of inadvertently identifying the cases we observed, we have not assigned case identifying codes to quotes or examples drawn from observations. We have also felt obliged to withhold some details that might have better illustrated the discussion in the interests of safeguarding confidentiality.

Throughout the report, unless the context demands otherwise, we use the term private family law to include both private law children cases and financial remedy cases. We

use the acronym LiP (litigant in person) in reference to litigants who represent themselves. Where the LiP has paid a fee to engage the services of a fee-charging McKenzie Friend, we refer to them as a client of the McKenzie Friend. Given the remit of the study, all references to McKenzie Friends relate to fee-charging McKenzie Friends in particular, unless otherwise specified.

## 2. McKenzie Friends and their clients

This chapter of the report covers the motivations, backgrounds, training and affiliations and business practices (including approaches to fee charging and obtaining clients) of McKenzie Friends. It also outlines the background and motivations of LiP clients. The discussion here is primarily based on data drawn from the interviews (both freestanding and linked to court observations) we conducted with McKenzie Friends and McKenzie Friend clients, though occasional insights from the court observations themselves are presented too.

### 2.1 The McKenzie Friend interview sample

#### 2.1.1 Estimating the number of fee charging McKenzie Friends

In 2014, the LSCP suggested it was not able to quantify the numbers of fee-charging McKenzie Friends, although it referred to anecdotal evidence of increased numbers since the cuts to legal aid.<sup>32</sup> One recent study estimated that there were between 40-50 fee-charging McKenzie Friends in operation in the legal services sector in England and Wales.<sup>33</sup> On that estimate, our sample of 24 interviewees<sup>34</sup> could be taken to include around half of the total population of fee-charging McKenzie Friends. However, for several reasons, we think the figure is likely to be an underestimate.

First, we initially identified approximately 50 McKenzie Friends operating in private family cases from a range of online directories and websites identified through Google searches. However, of the 11 fee-charging McKenzie Friends we encountered at court,<sup>35</sup> we had only identified three during our early search for interview participants; the others did not have an easily traceable online presence. At least one did advertise through a website, but using terminology that meant the website did not show up in searches for McKenzie Friends.<sup>36</sup> Secondly, it became clear during the research that a number of McKenzie Friends operate primarily through social media and/or word-of-mouth recommendations, especially through support networks designed primarily for fathers, e.g. Families Need Fathers (FNF).<sup>37</sup> Finally, as the Legal Services Board recently noted, the McKenzie Friends market 'is characterised by people entering and leaving the market, with a smaller pool of McKenzie Friends who are more established within the system.'<sup>38</sup> Some fee-charging McKenzie Friends operate on a fairly casual basis, possibly for a short period of time following a personal experience with the family justice

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<sup>32</sup> LSCP, above, n 5, para 2.5

<sup>33</sup> This figure was provided by the SPMF. CMA, above, n 20, para 4.75.

<sup>34</sup> 20 freestanding interviews and 4 court observation linked interviews.

<sup>35</sup> We identified 14 eligible cases. In two instances the case was not identified until after the hearing had commenced, so observation was not possible and we did not encounter the McKenzie Friend. Of the remaining 12 cases: one fee-charging McKenzie Friend did not show up; one case involved two fee-charging McKenzie Friends; two separate cases involved the same McKenzie Friend.

<sup>36</sup> See chapter 4 for more on the varying terminology used by McKenzie Friends to describe themselves.

<sup>37</sup> Families Need Fathers advertise as "supporting *all* parents - dads, mums and grandparents to have personal contact and meaningful relationships with their children following parental separation." However, their latest published annual report indicates a focus on non-resident parents, and the majority of non-resident parents will be fathers. We have been told that, although Families Need Fathers itself does provide support for both mothers and fathers, its predominant audience is the latter.

<sup>38</sup> LSB, above, n 21, p 12



system. For these reasons we think it more likely that the number of fee-charging McKenzie Friends operating at any given time in the legal services sector for England and Wales is in the region of 100 or so, with many of those operating in the field of private family law. On this view, our sample still represents a substantial minority (around a quarter) of fee-charging McKenzie Friends. But the important point here is that there is reason to believe that the population, while bigger than some estimates, is in fact very small (for comparison, the number of practising solicitors in England and Wales is currently around 136,000).<sup>39</sup>

### 2.1.2 Characteristics of McKenzie Friends included in the research

Because our interview sampling strategy relied on information available on websites it excluded McKenzie Friends without an online profile, with an online profile restricted to social media, or whose profile gave no indication of their being fee-charging.<sup>40</sup> This also meant that we mostly encountered established McKenzie Friends, though word-of-mouth referrals did enable us to interview two recent entrants to this line of work. In generating our initial list of potential interviewees, we selected to reflect a range of published fee levels and a range of geographical locations (this was difficult as a substantial majority of fee-charging McKenzie Friends appear to be based in London and the South East). We also took steps to ensure that the sample of 20 freestanding interviewees reflected diversity in relation to the characteristics displayed in the table below. We did not, of course, have any control over the characteristics of the four McKenzie Friends interviewed following observation of a court hearing.

*Table 1: Characteristics of interviewed McKenzie Friends*

|  |    |
|--|----|
| Relevant qualification or experience <sup>41</sup> | 11 |
| Personal experience of family court cases          | 11 |
| Link with Families Need Fathers or similar group   | 10 |
| Society of Professional McKenzie Friends member    | 5  |
| Male   | 13 |
| Female   | 11 |
| Total number interviewed                           | 24 |

Women are probably over-represented in this sample compared to the population of McKenzie Friends as a whole. Many of those operating on a less consistent and more transient basis than those with strong web profiles who feature in our sample appear to work through Families Need Fathers and other support groups that primarily support fathers. It therefore seems likely that the ‘invisible’ population is disproportionately male.

<sup>39</sup> Solicitors Regulation Authority data available here: [https://www.sra.org.uk/sra/how-we-work/reports/data/population\\_solicitors.page](https://www.sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page)

<sup>40</sup> We did interview one McKenzie Friend with only a social media presence. They heard about the study through word-of-mouth and they approached us to participate in the study.

<sup>41</sup> See Table 2, below, for our definition of ‘relevant qualification’.



There is room for much debate over what constitutes a ‘relevant qualification’ or ‘relevant experience’ for a McKenzie Friend. The classification we adopted is reflected in the table below.

*Table 2: Relevant qualifications reported by interviewed McKenzie Friends*

|  |   |
|--|---|
| Experienced solicitor                                | 2 |
| Experienced mediator                                 | 1 |
| Chartered Legal Executive                            | 1 |
| Experienced paralegal (family law)                   | 1 |
| Legal Practice Course (LPC) but no training contract | 1 |
| Bar Vocational Course (BVC) but no pupillage         | 2 |
| Law degree (GDL, LLM, or LLB) <sup>42</sup>          | 3 |

It was notable that each of the professionally qualified McKenzie Friends were female (solicitors, mediator and legal executive). When we initially searched for McKenzie Friends to interview, all those we found who were former solicitors were female.

We additionally interviewed two individuals who said they were part way through completing a law degree, two who said they had partially completed training to become a Chartered Legal Executive and two who reported taking CPD courses with the Institute of Paralegals. In our view, none of these things is sufficient to demonstrate, without more, that confidence could be placed in the McKenzie Friend’s ability to give sound legal advice and/or informed guidance on the legal process.<sup>43</sup>

As discussed in chapter one, the free-standing interviewees were purposively chosen because they advertised themselves as undertaking family law work. Many in our sample focused exclusively on private law parenting disputes.<sup>44</sup> However, a good proportion of interviewees were willing to take on finance cases, as well as the odd TOLATA<sup>45</sup> case.

## 2.2 A typology of fee-charging McKenzie Friends

As has been recognised in previous publications, McKenzie Friends are not a homogenous group.<sup>46</sup> The Legal Services Consumer Panel identified four types: i. friend/family member; ii. voluntary supporter; iii. paid traditional role; iv. paid extended role.<sup>47</sup> This typology tells us little about the nature or diversity of the profiles of individuals falling into the latter two categories. The detailed reports on background and motivations that our in-depth McKenzie Friend interviews provided enabled us to

<sup>42</sup> Respectively: Graduate Diploma in Law; postgraduate Masters degree in Law; and undergraduate Bachelors degree in Law.

<sup>43</sup> This is also likely to be true of those who hold a law degree but have no professional training or experience and we are ambivalent about whether this category should feature at all in table 2.

<sup>44</sup> The tendency to specialize on such cases was also noted by the LSCP, above, n 5, para 3.10.

<sup>45</sup> Trusts of Land and Appointment of Trustees Act 1996.

<sup>46</sup> Civil Justice Council (2011), above n 9, chapter 11, p53

<sup>47</sup> Above, n 5, para 1.4

move beyond the descriptive characteristics of McKenzie Friends that are presented in tables 1 and 2 above. Analysis of the interview data suggests that all our interviewees fall into one or more of the following categories:

- i. *The business opportunist*
- ii. *The redirected specialist*
- iii. *The good Samaritan*
- iv. *The family justice crusader*
- v. *The 'rogue'*

In an indication that the motivations of McKenzie Friends can be rather more nuanced than is sometimes supposed, these categories proved not to be mutually exclusive – indeed, most of our interviewees could be aligned with at least two of the first four. We have listed them in order of their prevalence among our sample, with the first category applying to almost every interviewee. By contrast, the latter category was not obviously applicable to any of our interviewees but did feature once in our observation sample, as well as in anecdotes presented by our interview sample.

### **2.1.1. The business opportunist**

For the business opportunist, working as a fee-charging McKenzie Friend offers some key advantages: no entry requirements, training or qualifications are required; set-up costs are limited to non-existent (working from home is possible and costs associated with professional indemnity insurance and registration with the Information Commissioner are only compulsory if the individual joins the Society of Professional McKenzie Friends); and the work brings few risks for them.

Almost all the McKenzie Friends in our sample made statements suggesting that their movement into this area of work was at least partly motivated by their recognition of a business opportunity. This included some of those who had been through the family justice process themselves. This interviewee, for example, initially assisted LiPs voluntarily after their own experience but became a fee-charging McKenzie Friend having realised that they could make money from the work:

There are thousands and thousands and thousands of people and there are - and it's an astonishing amount of people. So we set it up as a proper company and there is four of us in the office and we use at least a dozen different McKenzie Friends (Observation linked McKenzie Friend interview)

Illustrating a similarly entrepreneurial mindset, a small number of McKenzie Friends within the sample described plans for the growth of their McKenzie Friend business, for example, through the establishment of a network of affiliated McKenzie Friends.

Also of note were those who identified fee-charging McKenzie Friend work as an alternative path to a legal career because they were unable to obtain a pupillage, training contract or complete their legal executive training. In one instance though, this type of work was viewed as a useful stepping-stone to becoming a fully-fledged solicitor or barrister. Others with prior legal experience demonstrated that the business 'opportunity' rationale is more nuanced than it might first appear. This line of work was

seen as providing an opportunity to fit in within their personal lives and the needs of their family:

I wanted to have a bit more kind of autonomy because, you know, it's that classic thing where I have got like [family] who need me, you know things like that and sitting sort of, you know, being stuck behind a desk all day in a firm of solicitors kind of wasn't really working for me on a personal level. (McKenzie Friend interview)

It was also a positive opportunity to provide affordable legal advice flexibly, without the constraints of a formal business structure:

I didn't want to at this point in my life ... I didn't want to be sort of setting up in an office with, you know, kind of photocopying leases and possibly admin staff and then locums for when I go on holiday ... I have been sort of in that situation, albeit not as a sole practitioner, for many years, and it just kind of wasn't working for me, or for clients in my perception. (McKenzie Friend interview)

### **2.1.2. The redirected specialist**

We are aware of anecdotal stories of solicitors who have been 'struck off' setting up as fee-charging McKenzie Friends.<sup>48</sup> We did not come across this.<sup>49</sup> What we did find, as illustrated in table 2, above, was a collection of highly-experienced former professionals (family law solicitors, a legal executive, and a family mediator, each with many years' experience) who, for a variety of reasons, had moved into unregulated McKenzie Friend work.

So why had these professionals moved into this work? One of the non-practising lawyers had become disenchanted with the lack of family law employment opportunities in solicitor firms and as a consequence saw the unregulated sector as an opportunity to use and maintain their legal skill-set whilst assisting vulnerable family members who could not afford the services of a traditional lawyer.

The last interview I went for there were 75 lawyers. They started interviewing me with someone else's CV. At that point I gave up. And it hasn't improved as the local solicitors, I mean [firm name] for example, their family department has just gone down to a four-day week. So there is, there is nothing. There are no jobs, there is no work, and I don't think it's going to change. But there is a need. (McKenzie Friend interview)

In a way what is being described here is recognition of a business opportunity in light of lack of opportunities in the regulated legal services sector, and some of the other redirected specialists appeared to be similarly motivated. But frustration at unmet legal

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<sup>48</sup> The LSCP report also made reference to these anecdotes, but they, like us, did not find any evidence of struck-off lawyers acting as McKenzie Friends. (Above, n 5, para 1.11)

<sup>49</sup> This does not mean that there are no examples of practitioners working as McKenzie Friends in questionable circumstances. In one recent case, disciplinary action against a solicitor for inappropriately acting as a paid McKenzie Friend was upheld. *Ballard v Solicitors' Regulation Authority* [2017] EWHC 164 (Admin).

need is also revealed to be a factor in the quote, as it was for another redirected specialist:

I wanted to practice as a solicitor still but I wanted to set up a business that made it affordable to ordinary people. And I looked into setting up as a solicitor but unfortunately the extent of the regulation means that the insurance premiums are so high that I couldn't bring the hourly rate down to a level that made it affordable for people. So the only way for me to deliver this access to justice in an affordable way, was to do it this way, by giving up my practice certificate and acting as a professional McKenzie Friend. (McKenzie Friend interview)

This explanation has a touch of the 'good Samaritan' category (discussed below) about it, and this was reinforced by description of disillusionment with the nature of professional legal work, in particular charging practices. The interviewee said that they had become acutely aware of a major disconnect between what they wanted to offer as a lawyer, what clients could afford and what they felt comfortable charging, as compared with the high hourly fees and associated charging practices in some firms.<sup>50</sup>

The redirected specialists then, could each be aligned with other categories in our typology but as an apparently growing category (a number of non-practising solicitor McKenzie Friends can now be found online) they are worthy of mention in their own right.

### **2.1.3. Good Samaritan**

A 'good Samaritan' McKenzie Friend appeared substantially motivated by concern for the welfare and well-being of the client. Unsurprisingly, many of our interviewees made comments that suggested they were altruistically motivated. We only included an interviewee in this category though if espoused empathy with the needs and financial constraints of some LiPs reportedly manifested itself in charging practices, e.g. if the interviewee did some work for free or set their fees at a very low level in the interests of affordability for low income litigants.

One non-practising (and apparently very successful) solicitor suggested that their income as a McKenzie Friend was two-thirds less than that which they previously enjoyed as a full-time solicitor:

I am happy what I'm earning but certainly it wouldn't sustain a lawyer at my level, you know when I was working before. But I am a lot happier, the clients are happier and I feel that I am doing what I set out to do 20 years ago when I wanted to become a lawyer, which is to help people... I've had to make cutbacks myself in my lifestyle but that's a choice I made (McKenzie Friend interview)

This individual also indicated that they would only work for clients who could not afford the services of solicitors.

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<sup>50</sup> See further discussion on this point below, section 2.3.3.

We interviewed a couple of McKenzie Friends who appeared to charge only for parts of their work, or at a very low rate sufficient to enable them to get by on a very basic income:

Occasionally I will get, I get donations, people just say ‘thanks very much, can I make a donation?’ ... So I don’t need - I get my child benefit, I get my tax credits, and I do charge for little bits of things: photocopying, for putting bundles together. (McKenzie Friend interview)

Again, this individual exhibited other motivations too; their desire to help people was partly driven by a perceived need to combat bias in the family courts. But the point here is that being agenda-driven does not necessarily equate to being unscrupulous – quite the contrary in some cases.

One further interviewee explained that, having been through a divorce themselves and had a very good solicitor, they were asked to help out in someone else’s private family law dispute. This experience opened their eyes to the potential injustices incurred by the absence of legal aid, particularly for those with learning difficulties or mental health issues, and led to the decision to work providing support for those in that situation.

#### **2.1.4. The Family Justice Crusader**

Existing research suggests that many McKenzie Friends decide to take up the role following their ‘own negative experience of courts during divorce or child contact.’<sup>51</sup> Our research supports this finding to some extent but our analysis suggested that not all of those with personal experience of the legal system will become a crusader for their particular version of family ‘justice’. As already noted, some simply capitalise on their experience by converting it into a business opportunity, whereas others provide services at a low fee out of a desire to support others as ‘good Samaritans’. In fact, although there is a lot of concern about ‘agenda-driven’ McKenzie Friends only a small proportion of interviewees made comments that suggested they were even partly agenda-driven – fewer than we classified, according to stringent criteria, as ‘good Samaritans’. As such it seems that, while personal experience might well be a common gateway to working as a McKenzie Friend, it does not necessarily characterise the approach to practice.

Personal experience of the McKenzie Friends within the study varied, including direct experience of private family law proceedings as a party or vicarious experience as a parent or partner of an adult party, and experience of being a party to public law Children Act proceedings. One of the few examples of a person involved in the study presenting as a ‘crusader’ was a LiP client interviewee who became a McKenzie Friend as a consequence of their experience in the family court. This interviewee expressed anger about the system during the interview whilst apparently being aware of the need to appear reasonable in court. This is highlighted by the following two quotes:

The law itself is absolutely irrelevant, knowledge of the law is irrelevant because the only thing that makes a difference is how that judge feels about you, and if

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<sup>51</sup> LSCP, above, n 5, p 3 and para 3.5.

that judge takes a dislike to you... a judge will just make a decision based on their own prejudice.

(T)he other thing I've learnt because I've gone into court now helping other people and they say, and they've got pages full of crap, and I said "no, we're not going to do any of that, you're just going to say you're going to work with the mother to see the children, this is the parenting plan, that's what we want. And just stick to the facts, don't say anything negative, don't look at her, pick a spot on the wall, don't lose your temper, you know don't show any emotions and never say you love your children because that's an emotional response and the judge is going to knock you down because you show emotion". (McKenzie Friend interview)

These quotes are reminiscent of research by Melville, who found a contrast between the 'private' demeanour of several McKenzie Friends linked with fathers' rights groups on social media (including statements attacking mothers and the family court) and the more temperate and child-focused language used on their own websites.<sup>52</sup>

Many McKenzie Friends presented as highly child-centred, but a couple from our sample simultaneously exhibited negative perceptions of the family justice system, particularly lawyers, Cafcass officers and magistrates. The following is an example of a McKenzie Friend who presented as child-centred but maintained the familiar stereotypes about actors within the system:

Because you see you get some magistrates and particularly clerks to the court and that who might want to give father a kicking and it's a bit of a pleasure they get, the nervous litigant father. (Observation linked McKenzie Friend interview)

### 2.1.5. The 'rogue'

This type of McKenzie Friend, who unscrupulously exploits clients for personal gain or otherwise engages in wholly inappropriate conduct is at the extreme end of the spectrum. We saw limited evidence of rogue McKenzie Friends in our study. We did observe one case hearing involving a fee-charging McKenzie Friend who we would classify under this heading. We did so because aspects of the McKenzie Friend's conduct were demonstrably wholly inappropriate in the context of family law proceedings, and at odds with the role of a McKenzie Friend – even allowing for the fact that (as we discuss later in this report) fee-charging McKenzie Friends often perform an extended role. It was also clear the McKenzie Friend's conduct had at certain points impacted negatively on the trajectory of the proceedings and on the other party, who was unrepresented at the material times. During the course of the hearing observed, the other party complained bitterly about the conduct of the McKenzie Friend in question, referring to them as having engaged in abusive behaviour and perpetuated lies, and also characterizing the involvement of the McKenzie Friend in the case as 'lethal'.<sup>53</sup>

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<sup>52</sup> A Melville, 'Giving hope to fathers': discursive constructions of families and family law by McKenzie Friends associated with Fathers' Rights Groups' (2017) *International Journal of Law, Policy and the Family* 1-27.

<sup>53</sup> Further detail regarding this case is omitted from the reporting here in order to protect the anonymity of the various players involved.



Although we encountered limited direct evidence of the ‘rogue’, several McKenzie Friends in our sample spoke of encountering some:

I have acquired a couple of clients from another McKenzie Friend. £600 they would charge for a hearing and I just thought this is so obscene ... someone couldn't afford [MF] because she had [MF] for one hearing and then I can't remember how she found out about me but she wanted me to have the notes from the first hearing and [MF] said to her that it would be £150. So she paid and [MF] emailed me the notes and it was a page and a half of rubbish that I didn't need because she'd sent me the order anyway and it was just shockingly awful. (McKenzie Friend interview)

I've had one guy ring me up telling me that he gave a McKenzie Friend a thousand pounds and the McKenzie Friend never did any work for him, just disappeared off into the ether. You know now that McKenzie Friend, if they were on a central register they just could have been written to, when they didn't respond just had their registration cancelled. (McKenzie Friend interview)

We note further that a couple of our client interviewees mentioned unsatisfactory experiences, although how far they related to ‘rogue’ McKenzie Friends, as opposed to poor levels of practice or knowledge was difficult to discern.

Our research data suggest that, although the rogue McKenzie Friends dominate the legal and non-legal press,<sup>54</sup> they are a minority concern. Nonetheless, we are conscious of contextual information indicating that they are a concern that cannot be discounted altogether. When conducting an initial online search for potential participants in this study, we found references to one individual who had a conviction for sex offences and there was one high-profile conviction of a paid McKenzie Friend for fraud in the life course of the study,<sup>55</sup> as well as a conviction for a solicitor found to be acting less than candidly as a McKenzie Friend.<sup>56</sup> One McKenzie Friend was widely castigated on social media for advertising services to victims of domestic violence who could not afford a lawyer but failing to indicate that legal aid should be available to such victims. This is a high rate of issues for such a small population. Add to that further reported and unreported cases that have highlighted bad McKenzie Friend behaviour<sup>57</sup> and we suggest that this work is particularly vulnerable to exploitative opportunists with no regulatory body, no professional code or scrutiny, and potentially no set-up costs.

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<sup>54</sup> See, for example, ‘News focus: My McKenzie friend nightmare’, Law Society Gazette, 21/11/2016, available at: <https://www.lawgazette.co.uk/news-focus/news-focus-my-mckenzie-friend-nightmare/5058870.article>. See also the *Victoria Derbyshire Programme* which featured clients of a ‘rogue’ McKenzie Friend who was imprisoned in 2016. This programme first aired on 13<sup>th</sup> February 2017: <http://www.bbc.co.uk/news/uk-38912378>

<sup>55</sup> The David Bright case, see <https://www.lawgazette.co.uk/law/mckenzie-friend-jailed-for-deceit-in-family-court/5058352.article>

<sup>56</sup> Above, n 49.

<sup>57</sup> *Re Baggaley* [2015] EWHC 1496 (Fam), *Oyston v Ragozzino* [2015] EWHC 2322 (QB). See also the unreported 2015 case in which a fee-charging McKenzie Friend was imprisoned for three years after pleading guilty to 15 counts of fraud by false representation: <https://www.lawgazette.co.uk/news/mckenzie-friend-jailed-for-5000-fraud-scheme/5050653.article>.

## 2.3 Business Practices of McKenzie Friends

We found great variation in the business practices and procedures reported by the McKenzie Friends we interviewed. Much of that variation is to be expected given that paid McKenzie Friends are not united under the umbrella of any particular professional framework or organisation. However, much of what we heard was concerning and indicated a need for fee-charging McKenzie Friends to pay closer attention to the need for administrative procedures and business standards that are capable of safeguarding their own and their clients' interests.

### 2.3.1 Business structures

The most common business structure we found was individual McKenzie Friends working on their own as sole traders. Approximately half of those interviewed indicated that they were set up in this way. Most of those appeared to be trading under their own name, but there were a small number who used trading names, which included the word 'law' or 'legal', to denote that they were providing legal services.

Approximately a quarter had set up a limited company through which their McKenzie Friend services (and sometimes other services) were provided. In the main, those who had done so appeared to be the sole director and shareholder in their company. Again, several of the company names used indicated involvement in the provision of family law services.

The business set ups of the remainder were varied. They included a partnership between two McKenzie Friends, and another scenario in which there were two working together and there was a company involved. A third set up involved what appeared to be a fairly informal network of McKenzie Friends; at an earlier point in time there had been a limited company involved here, which was described as now dormant.

Among the various business structures, including among sole traders, there were some McKenzie Friends who indicated that they employed or otherwise paid someone else to provide administrative and/or technical support, but they were a small minority.

At the time of the study, details of the dormant company noted above still appeared on the relevant website, but on the whole, there was nothing in the interviews to suggest that clients of these McKenzie Friends would not know, in terms of legal status, whether they were dealing with an individual, partnership or limited company. Nevertheless, the variety of business structures adopted by McKenzie Friends, and the legal implications of those, does highlight the need for transparency for clients as to who is accountable for the services provided under fee-charging arrangements.<sup>58</sup>

The Society of Professional McKenzie Friends (SPMF) was founded in 2014 as a self-regulating trade organisation. As yet we have no information indicating levels of awareness of the SPMF, either among McKenzie Friends themselves or the general public, or whether its existence is challenging McKenzie Friends to aspire to particular

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<sup>58</sup> As a limited company is a separate legal entity in law, there is a need for clarity regarding whether a client is engaging the company or the individual(s) involved, and regarding whether if there are problems, clients would have any recourse against the company only, or also against the individual(s) personally.



models of practice. The SPMF currently lists 19 members,<sup>59</sup> thus representing only a proportion of the McKenzie Friends who can be found advertising fee-based services for private family proceedings online.

The SPMF was established in response to LSCP recommendations made in 2014. We saw some evidence that it has not yet established high-reputational status across the McKenzie Friend sector, with two interviewees (who would fulfil the membership criteria, as far as we could tell) suggesting they did not want to be involved because they felt that not all its members are credible. It appears that qualification and entry requirements have been set at a low level.<sup>60</sup> However, the Society does require insurance and registration with the Information Commissioner's Office, and it has an embryonic complaints handling process. It is to these business practice issues that we now turn.

### 2.3.2 Terms and conditions of business

Among the McKenzie Friends we spoke to, attitudes towards the need to supply clients with written terms and conditions of business varied considerably. At one end of the spectrum was one who, notwithstanding that they had operated on a fee-charging basis for several years, said that they had deliberately steered clear of producing standard terms and conditions, because they felt that introducing them would alter the nature of their relationships with clients. At the same end was another McKenzie Friend who had not produced terms and conditions because they doubted their value.

No I don't because you see, again, that might be a quirk to me. I don't like contracts particularly, I never have. I think the minute you start signing a contract you're declaring that you don't trust each other and I don't work like that, I don't tie anybody in to anything whatsoever. If they want me to assist them I will assist them, if they don't want me to assist them, they are free to go. You know, there is no terms and conditions, none whatsoever. [McKenzie Friend interview]

No, I have thought about doing that, I have thought about getting them to sign some form of agreement but I don't know how enforceable it would be in law because they just, there is no law as to signing an agreement with a McKenzie Friend because in theory anyone can rock up with you and be a McKenzie Friend can't they? [McKenzie Friend interview]

By contrast, some said they had produced quite detailed written terms; they included non-practising lawyers, who said they had essentially incorporated the information they would have been required to supply in their former career:

So we have to have very clear rules about what's expected of them and what's expected of me... my terms of business have what I can do, what I cannot do and it essentially is similar in other ways to the ...client care letter that lawyers send.

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<sup>59</sup> Based on data provided on the membership directory presented on the SPMF's website (accessed on 01/06/2017). See <http://www.mckenziefriends.directory/find%20a%20mckenzie%20friend.html>

<sup>60</sup> At the time of writing, the minimum legal qualification requirement to become a member of the SPMF appears to be an A-Level in Law, or three years' experience as a McKenzie Friend.

It's got my complaints procedure, it's got data protection in there, it's got things about who their information will be given to...people who have access to it so exceptions to the confidentiality rules. So in relation to the rest of it I still conduct myself in accordance with the good practice that is advised by my profession which is the Law Society. So I still adhere to confidentiality, I still adhere to conflict of interest, I still send out the client care letter. [McKenzie Friend interview]

Between these two extremes were several McKenzie Friends who said they did provide clients with at least some written information about how they operated and the basis on which they charged. For example: "I tell them what my role is and I tell them what my hourly rate is. I tell them what that would cover. And what my standard charge would be for attending a hearing." This group also included one who said they had incorporated into their terms and conditions a disclaimer in respect of the provision of legal advice. However, in one instance the provision of written information was admitted to be a somewhat hit and miss exercise.

I have some terms and conditions. I tend to – if I'm really honest, those are, I only tend to give those to people who ask. [McKenzie Friend interview]

In another instance, operating informally without standard terms and conditions was identified as having 'caused us some issues', leading the McKenzie Friends involved to comment that 'we need to tighten up on that a bit more' and 'actually write some'.

### **2.3.3 Fee structures**

There was much variation in the levels of fees charged, and the basis on which they were calculated, by the McKenzie Friends in our sample. The main models identified were hourly rates, fixed fees, and a combination of the two. There was one who described accepting small 'donations' from clients rather than routinely charging according to set rates. Many of the others said that they would adapt their charging structures, depending on one or more of: the type of work done; clients' circumstances; and location of any court hearings travelled to.

Where set hourly rates were cited, there did not appear to be a typical 'going rate'; they ranged from a low of £15 per hour to a high of £90. Within this range, rates of £25, £30, £45, £50, £60, £70 and £80 were reported. One interviewee referred to day rates; their charge for a half-day was £250. Some, though not all, of the hourly rates towards the higher end were cited by non-practising solicitors; some, but again by no means all, of those at the lower end were charged by interviewees who were not full time McKenzie Friends and/or said they were not dependent on the work for a living.

Approaches to fixed fees also varied. There were some examples of packages for undefended divorces but fixed fees were most often described in relation to attendance at court hearings. Here, fees McKenzie Friends said they typically charged ranged between £100 and £400, with sums of £250, £300, £335, and £360 in between. These sums tended to be cited as applying to first or interim hearings, which ordinarily would be expected to require no more than half a day at court (including waiting time). The highest sum cited was £500 for a fact-finding hearing or final hearing. In several

instances the sums quoted included preparation – typically initial advice, helping with drafting of applications and position statements, and the McKenzie Friend's own preparation for hearings. Travel to court tended to be included in the fixed fee within a certain radius of McKenzie Friends' bases; those who were willing to travel further afield said they often increased their fee and/or charged travelling expenses for doing so.

A number of interviewees said that they required clients to provide funds on account and, especially where attendance at court was involved, make payment up front; for one McKenzie Friend this was because they had "been ripped off quite a lot" and felt it necessary to "harden up". Some referred to their fees as being "non-refundable", including one who said that they would not refund a fee if they attended a hearing which went short.

So if, let's say, court is adjourned then they get everything back ... except for £50 because it's keeping the date available. ... If it gets adjourned but we've waited three hours in court then obviously I proportion a bit of it and then give them the money, like forward it. But it has to be used for another hearing date, does that make sense? Or another thing. So it's non-refundable. I say it's non-refundable but I will, I'll put it towards something else. [McKenzie Friend interview]

In contrast, during the course of observations at court we encountered a case in which a final hearing had been listed for a full day but it was not possible for it to go ahead as a final hearing; in that instance the McKenzie Friend readily refunded a proportion of the fee that the client had paid.

#### **2.3.4 Professional indemnity insurance (PII)**

The five interviewees in our sample who were members of the SMPF were able to obtain PII (which is a condition of their membership) through contact details provided by the SMPF. Other McKenzie Friends reported seeking insurance through other routes, including companies advertising through the Institute of Paralegals. Related costs of insurance varied but the most common suggestions indicated a rate of approximately £600-£700 p.a. for up to one million pounds of cover. The occasional McKenzie Friend suggested that they had recently been quoted almost double to three times this amount and, as a consequence, had decided not to renew (only two McKenzie Friends reported current PII other than the SMPF members). Those who still had insurance felt that it was important to safeguard themselves and their clients, particularly as it differentiated, in the words of one interviewee, the 'good' McKenzie Friends from the 'cowboys':

I think there's only about two dozen of us that are members now [of the SMPF] and I wonder whether that actually points to the fact that, you know, some people are out there who may be being a McKenzie Friend, don't actually want to be incurring the costs of insurance, they don't want actually to offer a proper service, you know, and also that they didn't meet the minimum criteria to join in terms of their qualifications and their experience. ... [I]t's so fundamentally important to me that if I couldn't have got insurance, I wouldn't be doing it. (McKenzie Friend interview)

Some McKenzie Friends who did not have insurance suggested that they were willing to consider it for reasons including wanting to appear as 'professional and robust as possible', whilst others who did not have insurance expressed concern over the issue of the label 'professional' insurance, when they considered that fee-charging McKenzie Friends do not have a 'profession':

I've looked at it but I am jittery simply because of the word professional. ... I don't know how you can be professional, if you say commercial that's different but professional requires some professional qualifications and until someone creates them or recognises them ... when I initially looked it made me jittery that it was blurring the lines about what I am. (McKenzie Friend interview)

The main reason given for not having insurance was the cost; a number expressed concern about the impact that compulsory insurance might have on the ability of poorer LiPs to afford their services should it be necessary to pass the costs onto clients through increased fees. Other reasons given for not obtaining insurance included: there was no need because they were not giving legal advice; they were not storing clients' documents; they were not conducting litigation within the terms of the LSA 2007 or representing the litigant. Insurance was also viewed as unnecessary by some because the LiP client is technically in charge of their own case and takes the decisions - not the McKenzie Friend. On that analysis there would be nothing to insure against. That said, challenging the need for indemnity insurance by presenting a strict and limited interpretation of the role of a McKenzie Friend ignores one of the key findings of this research: that McKenzie Friends undertake a variety of tasks, which in most cases (as far as we can tell) includes giving some form of legal advice (see further discussion in chapter 3).

### **2.3.5 Data protection issues**

With the odd exception, most of the freestanding McKenzie Friend interviewees appeared alert to the need for data protection and a variety of means were reportedly used to maintain some form of client confidentiality. These varied in sophistication, including: asking clients to keep their own paperwork; having a password protected computer; shredding documentation; paying for sacks to be collected and shredded confidentially; not disclosing documentation to third parties; ensuring documentation associated with a case was returned to the LiP client after the case concluded; or having secure storage for older records.

For some there was haziness around certain details, for example the security of email correspondence linked to mobile phones or cloud storage:

Well it's all on, it's all on file, all on my computer and I am trying to avoid, trying to move everything to sort of paper free. I mean, you know, back-up stuff and cloud storage. I'm not aware that that's a risk, having it all - as far as I am aware, I am sure I would have heard about it one way or another. If you were putting your clients' information at risk by all this cloud storage then I am sure I would be told, I would know about it somehow, from the emails I get from the IOC [sic]. (McKenzie Friend interview)

The end of the quote indicates that this McKenzie Friend had registered with the Information Commissioner's Office (ICO). This was also true of a number of others, including members and non-members of the SPMF. Several interviewees appeared not to have considered registration with the ICO, and a couple suggested they were deterred by the requirement to pay an annual fee for registration (which for most businesses would be only £35).

### 2.3.6 Complaints procedures

The McKenzie Friends we spoke to gave a broad range of responses to questions about complaints handling and procedures. Most said they had never received a complaint about their services<sup>61</sup> and attributed this to their fair charging practices and the good levels of service provided to their clients. However, amongst the client interviewees, we did come across the occasional dissatisfied individual. Additionally, in one of the observed hearings, the other party in the case was vehement in their array of objections regarding the behaviour and standards displayed by a fee-charging McKenzie Friend:

I do think that McKenzie Friends should be governed and monitored and restricted and either some sort of you know some sort of test that they have to go through and I think that they need to be answerable, I think they need to be accountable for what they do because you know especially in law and especially when dealing with family law you know it's a massive. I have had massive, massive damage caused to my relationship with my children by mainly the involvement of [McKenzie Friend name]. (Observation linked interview, other party)

In light of their extremely poor experience of being opposite a fee-charging McKenzie Friend, this interviewee commented on a lack of an official complaints process and was aware that there is no regulatory body governing standards for fee-charging McKenzie Friends. Moving away from this atypical, albeit troubling account, at the other end of the service spectrum, some clients who reported a positive McKenzie Friend experience still expressed concern about the lack of a formal complaints process:

You know, like, if you've got an issue with, I don't know, a service, a council, you know to use the Local Government Ombudsman. Various kind of public bodies, you know where to go to for the complaints. For McKenzie Friends, I don't think they're regulated, are they, so who would you complain to? (Observation linked interview, McKenzie Friend client)

In a further interview linked to an observed case, a LiP client of a McKenzie Friend appeared very confident that they would know what to do if they had to complain. They were aware that there was an 'Association of McKenzie Friends' (presumably they were referring to the SPMF). However, this LiP's McKenzie Friend was not a member of the SPMF and therefore this complaints route was not open to this client, despite their apparent awareness of a relevant trade organisation.

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<sup>61</sup> This included one McKenzie Friend interviewee, in relation to whom we later became aware of at least one complaint. Of course, we cannot verify whether this McKenzie Friend had ever received a complaint directly from the individual who complained about them, or whether the complaint had any merit.

A large proportion of the McKenzie Friends interviewed suggested that if they were to receive a complaint, they would take it upon themselves to resolve it. The range of actions suggested included refunding the client's money; offering a free consultation with a McKenzie Friend colleague if a client disagreed with their advice; proposing mediation to settle the dispute; and willingness to go to court if necessary. Less constructively, one interviewee described ensuring that LiP clients paid upfront so that they would be unable to withhold payment in the event of a complaint.

Paid McKenzie Friends who are members of a trade organisation, whether the SPMF, the Institute of Paralegals or the Chartered Institute of Legal Executives, unsurprisingly reported that they would use that organisation's complaints procedure if they were faced with a complaint.

I am a member of the Institute of Paralegals so if somebody did want to complain - and I'm on the PPR register, I know it's quite new, but there is an avenue for people to take it further from me. But I've not had one. (McKenzie Friend interview)

For one of the non-practising solicitor McKenzie Friends, being a member of an organisation was important, as they wanted to give their clients the confidence that they were part of a trade association so that if a client was unhappy with the level of service they had somewhere to go that was independent. This focus on the value of an independent complaints handling process featured in only a small number of interviews but was notably more prominent among those McKenzie Friends who had some legal training or background.

Whilst the Institute of Paralegals and the Chartered Institute of Legal Executives do have independent complaints procedures, the SPMF reports that in the first instance it will investigate complaints in-house before referring the complaint to an external adjudicator (who this would be is unclear from the website) if the LiP client remains dissatisfied.<sup>62</sup> One SPMF member did indicate discomfort related to the 'in-house' stage of the complaints procedure and another interviewee suggested that another 'outside' organisation, such as the Institute of Professional Paralegals, may be 'better suited' as an independent complaints authority. (McKenzie Friend interview)

### **2.3.7 Obtaining clients**

One of the key routes for obtaining clients reported by many of the McKenzie Friends was through word of mouth and client recommendations:

I could survive now with just word of mouth, I don't need to actually advertise at all. I have so many people just coming to me from referrals. (McKenzie Friend interview)

However, this was only partially reflected in the client interview data. Whilst a few clients suggested that they heard about their McKenzie Friend through word-of-mouth,

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<sup>62</sup> <http://www.mckenziefriends.directory/service%20standards.html> (accessed on 03/02/2017)



this was invariably channeled through groups or organisations such as Families Need Fathers. We were told that local branches of such organisations sometimes provided a list of McKenzie Friends and/or a forum in which parents could discuss problems and make recommendations for others in a similar position to themselves.

I went to a few of the Families Need Fathers meetings and asked for recommendations. I was given three or four names. I contacted a couple of them and they both sounded very good. And one of them was pretty busy and the other was more available so I went for that one. (Client interview)

Unlike most of the McKenzie Friends interviewed, the clients we interviewed emphasised particular groups as the main mechanism through which they chose a McKenzie Friend:

I found Families Need Fathers through the Citizens Advice Bureau, and they put me onto my local branch, which is where I met my McKenzie Friend. (Client interview)

Well I go to the Fathers 4 Justice meetings and, yeah, and then there is also - I forget their name - there's loads of information there about McKenzies. (Client interview)

Another gateway identified by both McKenzie Friends and clients was online searches. Some clients reported searching directly for 'McKenzie Friends' or for 'child access issues'. But links with fathers' rights/support organisations again manifested themselves through internet searches:

[J]ust found out various names ... by Googling 'What do fathers do to gain access to their children?' and anything that came up, I'd have a look at. Yes, I was totally desperate, and through the Fathers 4 Justice or the Real Fathers 4 Justice or something, I got [McKenzie Friend Name], somehow, by some tenuous link from there. (Client interview)

I just searched the internet for men's advice and men's rights and things like that and I found a men's charity and this McKenzie was attached to the men's rights charity. (Client interview)

A number of the McKenzie Friends identified online directories as a route of referral for clients. This is unsurprising given that our interview sample was generated using details of McKenzie friends published on a number of directories and through online searches. A small proportion of our McKenzie Friend and client sample reported that they obtained clients through social media.

### **2.3.8 Training and professional development**

We noted above that a number of McKenzie Friends involved in the research held, or were working towards, relevant qualifications. Although a small number of those with relevant qualifications were selectively sampled by us, we were surprised at the frequency with which relevant training and development opportunities were reportedly

sought and pursued by the others. A picture emerged in which many fee-charging McKenzie Friends are keen to further their knowledge and skills and willing to invest time and money in doing so.

The reported desire among McKenzie Friends to improve the knowledge-base from which their services are provided is reflected in the existence of a number of bespoke McKenzie Friend training courses that have been devised by individual McKenzie Friends. Most of these courses attract a fee and details about some of them can be found easily through an online search. A number of our interviewees had developed and delivered, or participated in bespoke McKenzie Friend training. We heard mixed views on the usefulness of the courses. Several had clearly found them to be very informative and thought-provoking. By contrast, one McKenzie Friend described the course they had attended as ‘scarily superficial’.

One risk attached to the existence of bespoke ‘training’ for McKenzie Friends is that it could give rise to the illusion that there is a standard and accepted qualification for this type of work, as appeared to be the case for this interviewee:

The Department of Work and Pensions paid for me to go on the McKenzie Friend training courses... and I then qualified if you like on an official basis ... and I have been using the certificates from then to enhance my knowledge, go into court, let the court know that I am not just an inexperienced nobody. (McKenzie Friend interview)

One client we interviewed had taken a bespoke McKenzie Friend training course with a view to equipping themselves better to act as a litigant in person. That person was concerned that the courses might lead to an inflated sense of the knowledge and experience of McKenzie Friends:

It did concern me a little bit that ... the people on [the course] didn’t have a lot of experience on this and after the training, you know, [the trainer] was turning them out to be a McKenzie Friend where actually it takes a bit of time and it takes a bit of experience and it takes a lot of expertise. (Client interview)

It is not possible for us to comment objectively on the quality of bespoke McKenzie Friend courses. Irrespective of their quality, however, their apparent popularity is indicative of an appetite for professional organisation and development among fee-charging McKenzie Friends. With sufficient take-up, there is at least the potential for bespoke training to contribute to the development of a more credible image of paid McKenzie Friends as a cohesive group with discernable practice norms and standards. In that respect the providers of bespoke training are of at least as much interest as the SPMF.

One recently launched online platform for linking litigants with fee-charging McKenzie Friends has outlined an ambition to ‘provide a training programme with the assistance of one of its supporting universities in London’. It is unclear how certain or imminent such a development is but, should a university supported or delivered programme come



to fruition, it could be a game-changer in terms of the credibility and utility of bespoke training.<sup>63</sup>

### 2.3.9 Working from home

A small number of interviewed McKenzie Friends used hired office space but this was very much the exception (and they were the non-practising lawyers). The majority of our sample said they worked from home. Some conducted most of their work by phone and/or email and would only meet clients face-to-face at court (if they attended court at all).<sup>64</sup> Most tried to meet with clients at a mutually convenient location, though a small number would also see clients at their home office occasionally:

Yeah it's me so I am the head office, which I have a study in my home so if someone wants an appointment they either come to me in my home or I go to them. (McKenzie Friend interview)

Even those with a serviced office space reported being willing to meet clients 'wherever suits them'. Therefore, flexibility to the needs and affordability requirements of the client appeared to be a key theme running through the business practices of the McKenzie Friends that we spoke to:

I do like to have face to face meetings with people if I can but sometimes people can't do that ... so I would set up a series of telephone conferences and we would spend sometimes hours, well yeah hours on the phone, talking through things. (McKenzie Friend interview)

Whilst this is an example of McKenzie Friends focusing on the needs of their clients, there are risks associated with this flexible and informal relationship. We heard a couple of accounts of emotionally unstable clients who were heavily reliant on the McKenzie Friend. In the absence of boundaries to establish a professional relationship, this has the potential to be troublesome. The most significant risks highlighted by the research related to safety, and concerns around safety are particularly acute given the frequency with which McKenzie Friends appear to work from home.

In one very concerning interview, a McKenzie Friend described having been assaulted twice during the course of their work and related worrying about the practices of McKenzie Friends as a result:

[A] lot of male McKenzie Friends to save on costs etcetera will maybe stay with the client the night before, especially if it's a lot of travelling and there is a lot of travelling. So I did stay [in the case being discussed] and I was sexually assaulted. ... I thought what are you doing, you're in [place name], you're on your own, you

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<sup>63</sup> The ambition appears on the website of the controversial McKenzie Friends Marketplace. The MFM is the brainchild of an undergraduate law student from the University of Westminster and was initially reported as having the support of at least one university though, as far as we can tell, those universities do not appear to have formal links with the platform at the time of writing. MFM aims to function as a 'quasi regulator' and as a gateway organisation for paid McKenzie Friend services. See <https://www.lawgazette.co.uk/news/universities-back-mckenzie-friend-portal/5060348.article> and <https://www.mckenziemarketplace.co.uk/aboutus> (last accessed 2/6/17).

<sup>64</sup> A small number of our sample suggested that they did not go to court but used direct access barristers for court hearings. See chapter 4 for further discussion of this point.

know you really need to start thinking about your safety. ... I was also sexually assaulted actually in [place name], in court. ... [B]y a client. (McKenzie Friend interview)

Staying overnight in the LiP client's accommodation was not an atypical occurrence. In one of the observed cases, the fee-charging McKenzie Friend commented that they had stayed overnight at their client's house the night before the hearing. Whilst both clients and McKenzie Friends described the informality of the relationship as one of the attractive features of employing a McKenzie Friend compared with the more formal relationship that a solicitor maintains with their clients, this informality is not without its risks.

### **2.3.10 Ethical dilemmas/issues for the McKenzie Friend**

Another point of interest concerned ethical boundaries within which fee-charging McKenzie Friends worked. Without formal guidelines provided by a regulatory body, we wanted to examine the extent to which the interviewees were self-regulating on this point.

A potential conflict of interest was a feature in one of the observed cases where a McKenzie Friend was assisting one party and it transpired that the other party had previously attempted to instruct the same McKenzie Friend. The matter dominated the early part of the hearing, and the McKenzie Friend subsequently withdrew from the case. Some of the freestanding interviewee McKenzie Friends had also encountered potential conflict of interest issues, whilst others appreciated the administrative difficulties in ensuring a conflict of interest did not arise. For example, one McKenzie Friend suggested that they did get caught out once and that as a consequence they have considered, but have not yet implemented, IT administrative mechanisms to deal with the issue.

Beyond conflict of interest issues, a number of McKenzie Friends in the study suggested that they were fortunate in that they can pick and choose clients. This issue came through in particular when some McKenzie Friends suggested that they would not assist LiPs who were not (as they perceived things) acting in the child's best interest. Whilst a number of McKenzie Friends did not elaborate further on this point, some did and suggested that they would remove themselves from a case if a client was obstructing contact without good reason.

I signed up to, I think it was termed a code of practice that [support organisation] produced. Now, I have some difficulties with some of its terms but I signed up to it to go on the list. And, one of the terms to assisting as a McKenzie friend, was not to assist anyone who is obstructing contact without good reason, from the other parent. So, for example, if I think that to be the case then I won't assist them. But that's, that's just a choice I can make, that under the cab rank rule for a barrister, for example, they don't have that sort of freedom. ... And I'm in a nice position in a way, as a McKenzie friend, that I can say that, "Sorry I don't think I can assist you any more, I've tried to give what I think is good advice, I think you're taking the wrong track here, I don't think your approach is reasonable or child-centred, I don't feel I can assist". (McKenzie Friend interview)

Other reasons that McKenzie Friends gave for not feeling able to support a client included: the LiP having previous criminal convictions for sexual abuse or serious domestic abuse; where the McKenzie Friend felt that a case was being brought out of spite and with a sense of vengeance; if a case involved an illegal matter; if someone failed to give full and frank disclosure in a finance case and/or intended to mislead the court; or where a LiP is unable to maintain confidentiality about the case and/or posts on social media despite warnings. Crucially, most of these examples describe ethical self-regulation by the individual McKenzie Friends. Some McKenzie Friends have therefore thought about potential risks and issues in this regard, though many were less considered.

## 2.4 The clients of fee-charging McKenzie Friends

### 2.4.1. Who are they?

#### *More men than women*

When asked about their clients, a majority of the McKenzie Friends we interviewed reported that more were male than female, with a small number indicating that as many as 90% of their clients were men. This is unsurprising, given the predominant preference for working on private children (as opposed to finance) cases among the McKenzie Friends we interviewed, combined with the prevalence of links with father-focused support groups that appeared to serve indirectly as a business publicity tool. In our efforts to recruit a sample of clients of fee-charging McKenzie Friends, we were contacted by far more men than women. This to some extent confirms the gender balance reported by the McKenzie Friend sample, though the skewed nature of our client sample means that it does not reliably indicate the characteristics of the population.

None of our interviewees said they worked exclusively for clients of one gender and a number noted that the gender balance had shifted in the wake of the withdrawal of legal aid for private family cases:

I would say that it changed entirely because of Legal Aid and prior to that my female clients were probably 5%, it was a very, very small number. Now I would say they are probably 60%. (McKenzie Friend interview)

A handful similarly felt that they now worked for more women than men, with a handful of others indicating that the gender split was roughly equal.

One concern related to the gender balance of the clients of McKenzie Friends relates to the possibility that paid McKenzie Friends are effectively more accessible to male than female litigants. The links between many McKenzie Friends and support groups that exclusively or primarily target fathers mean that women are probably less likely to receive a recommendation or even become aware of the existence of paid McKenzie Friends as a source of support. This suspicion was reinforced for the research team when we discovered that most gender neutral or female-focused websites that offer information of relevance to a family law dispute either do not mention McKenzie Friends at all, or simply reference them as an option – often with an associated

caution.<sup>65</sup> By contrast, many websites that are targeted at men describe the work of McKenzie Friends positively and prominently and some even provide a directory of paid McKenzie Friends and their contact details.

### *A range of income groups*

It was reported that the clients of fee-charging McKenzie Friends come from all parts of the income spectrum:

They range from cleaners up to people who are multimillionaires. (McKenzie Friend interview)

I've just recently helped a client that earns over a hundred grand a year and I've recently helped a client that has had all his benefits stopped so it's a real eclectic mix (McKenzie Friend interview)

The fact that more women have reportedly been seeking the services of fee-charging McKenzie Friends post-LASPO suggests that the client-base of some is at least partly composed of those on very low incomes. In a minority of cases, the McKenzie Friends told us that they pitched their services (and fees) at exactly those clients:

The vast majority of work that we get are from people who have no money, who are on benefits and single mothers, single fathers, people who are disabled, people who have got all sorts of other issues, mental health issues, serious illnesses – they have no money, so how you can charge them is really difficult, they have come to see a McKenzie Friend because they can't afford a solicitor and they can't get Legal Aid. (McKenzie Friend interview – only accepts 'donations' and expenses)

Such altruism was not always in evidence, however. One interviewee reported that they did not usually accept clients in receipt of benefits because "they usually can't pay at all so it would only be if I can give them advice over the phone or information over the phone you know". Of course, the hourly, or per hearing, fees charged by many McKenzie Friends we spoke to are such that many would be out of reach to the poorest litigants. This is reflected in a number of the client interviews who reported spending many thousands of pounds on lawyers' services prior to engaging their McKenzie Friend.

I spent something like £27,000 on a solicitor and he kept telling me that he was trying to keep my costs down but we didn't seem to be getting anywhere so I eventually got rid of my solicitor. (McKenzie Friend interview)

The impression we obtained through interviews was that most work is done for clients on middle incomes, i.e. those who could not afford to spend thousands on legal services but would have been above the threshold for receiving legal aid pre-LASPO. From within that cohort one McKenzie Friend described a policy of only representing those who could not afford a lawyer:

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<sup>65</sup> Examples of websites we checked include Women's Aid, Gingerbread and One Plus One.

A lot of these people have nowhere to go. They are caught between representing themselves and navigating a really complex legal process, or bankrupting themselves and credit cards, and a lot of them can't even do that because they have no funds at all. So I made it so clear that on the whole it was a service for people who really have nowhere else to go and that's essentially who I work for. I have turned away, in two years, about 20 clients on the basis that they clearly have the funds and then I sent them to [law firm]. (McKenzie Friend interview)

That said, the same interviewee noted that clients with extremely low incomes would still be unable to afford their services.

#### *A range of backgrounds and abilities*

The McKenzie Friends we interviewed reported a wide spectrum of abilities among their clients. At the more needy end, they noted that:

[S]ome people, they can't actually read or write, they're functionally illiterate and that's not necessarily people on benefits, that's people quite a lot further up the socio-economic scale ... [others] can read a book, they can fill in a form, but that's completely different to being under emotional stress and having to create a statement or express what happened in a logical structured way. (McKenzie Friend interview)

Several of the McKenzie Friends we interviewed commented that they saw a surprisingly high proportion of clients with particular needs or vulnerabilities, including mental health issues, learning difficulties and physical disabilities. However, consistent with the diverse range of incomes that McKenzie Friends reported, they also suggested that some clients were highly educated and skilled:

95% of them are really capable. I mean I am astonished at how bright and clever these people are - and it doesn't depend on their education or their background, they are very, very clever. So a lot of them do not need handholding, or to be taken over, they just need information and direction and then know they can come back and it's not going to cost them an arm and a leg. (McKenzie Friend interview)

### **2.4.2 Reported reasons for using use McKenzie Friends?**

#### *Cheaper than lawyers*

Anecdotally, concerns are often expressed about McKenzie Friends charging fees that are the equivalent of those that might be charged by qualified and regulated professionals, namely junior solicitors and direct access barristers. It certainly is true that the advertised rates of some McKenzie Friends look high. However, the combined reports of the clients and the McKenzie Friends that we interviewed, suggest that concern on this point may be overstated. In practice, it appears that the way in which McKenzie Friends calculate their fees are often different from the charging practices of most solicitors, resulting in overall costs to their clients that may make them considerably cheaper than many lawyers.

By far the most striking findings in relation to the cost of McKenzie Friend services came from our client interviews. A majority had used lawyers at some point before deciding to use a McKenzie Friend and we asked clients to recall the amount they had paid to both lawyers and to their McKenzie Friend. The reported differences were stark. In the case of two interviewees who had been involved in protracted proceedings involving children, finance and domestic violence issues, the lawyer fees were reported to be ten times the McKenzie Friend fees (£20,000 on lawyers and £2,000 on McKenzie Friends; £40,000 on lawyers and £4,000 on McKenzie Friend). In both those instances it sounded as though the McKenzie Friend had been involved for as long, and in connection with as many hearings, as the lawyer. A large number of the McKenzie Friends we interviewed described similar instances of clients having exhausted their resources by spending tens of thousands on lawyers before seeking out their services.

For the most part, the total amount that clients reported spending on a McKenzie Friend fell below £1,000 and in several instances that covered support at more than one hearing together with all associated preparation and paperwork. Indeed, for the clients we spoke to, the value of the McKenzie Friend in monetary terms correlated strongly with the volume of work that was done for every hour that they were billed for:

The solicitor was £150 an hour, I think, and for [McKenzie Friend] it was about a third of that at the very most. I think [McKenzie Friend] was about £40 plus VAT. I don't know if VAT was included, but about £40 or something, and I really did get bundles of e-mails for about £40. (Client interview)

I think it was about four hundred and something. It was around that sort of mark, whereas we'd already paid out a thousand for nothing done by the solicitor. And the McKenzie Friend, literally, because I wanted to get this court bundle right, I was e-mailing them and phoning them virtually on a daily basis, and they always responded. (Client interview)

Of course, our client sample was skewed in favour of those with a positive experience of using a McKenzie Friend,<sup>66</sup> which means that, if less client-friendly charging practices exist among McKenzie Friends, we were unlikely to hear about them. We note also recent research commissioned by the Solicitors Regulation Authority which found that whilst over two-thirds of consumers in a survey reported solicitors costs in family law cases to be affordable, 31% found solicitor's costs 'difficult to manage'.<sup>67</sup> Nevertheless, the extent to which the reports of almost all the McKenzie Friends and clients in our sample were in harmony in relation to the rapid and dramatic escalation of bills for the services of lawyers was concerning and there seems little doubt that the McKenzie Friends proved substantially cheaper for our client sample.

### *Flexible, available and informal*

Whilst affordability emerged as a key issue surrounding litigants in person rationales for choosing a fee-charging McKenzie Friend, it was not the only reason provided. Perceptions of the flexibility and availability of the fee-charging McKenzie Friend, as

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<sup>66</sup> See discussion above at section 1.2.2.

<sup>67</sup> Ecorys, *Experiences of consumers who may be vulnerable in family law: A research report for the Solicitors Regulation Authority* (2017), p 31. Available at: <http://www.sra.org.uk/sra/how-we-work/reports/vulnerable-consumers.page>



well as the informality of the working relationship between McKenzie Friend and LiP client were very apparent. McKenzie Friends suggested that they were able to meet and discuss cases with clients outside of normal office hours - providing a service which goes beyond, and is completely different to that provided within the necessary bounds of the formal relationship between solicitor and client:

[I]t's an entirely flexible thing as to what suits them [the client]. And I am happy to meet with people, you know, sort of early evening as well because obviously it's not always easy for people to get out of work to go to see a traditional firm of solicitors in their hours... I have even met clients on Sundays before, you know, but that's kind of, kind of the, I suppose, the principle of it. And what I'm trying and hopefully achieving is for it to be a kind of much more user-friendly thing. (McKenzie Friend interview)

My clients can phone me up at 11 o'clock at night and say [name] I've got a problem. I haven't got a problem with that at all. That makes us so more accessible than a solicitor. It also means that I don't have to put on airs and graces, I don't talk to my clients as if I am some sort of "Dear Mr [name]...", it's like, "look mate, what the fuck have you done?" You know, I can have a really honest, down the pub conversation with both women and men which breaks down boundaries and gets things done. And I don't think solicitors can compete with the flexibility which makes us really effective. (McKenzie Friend interview)

Responding to calls, texts and emails late at night and on weekends or during holiday periods, responding to multiple emails and phone calls, and the lack of formal office hours were all elements of the informal and flexible arrangements that McKenzie Friends prided themselves on and LiP clients appreciated:

[E]ach time I sent an email he would respond literally the next morning... The emotional support - whereas direct access barrister and the solicitor just weren't interested, they were just interested in facts and what the law is... From the emotional side of things so actually he understood where I was coming from. (Client interview)

He is your mate as well as, you know, so at the end of the day you go you know you go to the pub afterwards and you have a drink and you go, you know and you can just let it all out properly. (Client interview)

The experience is empowering for some, providing clients with the opportunity to maintain control of their own case:

The money I invested with [McKenzie Friend] ultimately has set me up with the right level of knowledge to manage my own case all the way through. So [McKenzie Friend] helped me set up for court for the first couple of goes that I went and what have you but then I've taken all the stuff that he showed me and I've just put that into practice myself ... I've sort of been going in and out of court even without [McKenzie Friend] I have done the self-same position statement and just chopped and changed some of the wording. (Client interview)

In this respect, several of our McKenzie Friend interviewees stressed that their services were distinguishable from those usually provided by a solicitor or barrister:

I think the big illusion I hear, especially from the solicitors, is that people use us because they can't afford a legal professional but we get a lot of people come to us who say they don't want to use a legal professional. We get quite a few clients who could easily afford a really top solicitor that use us instead. ... We speak to a lot of people and they say that they used a solicitor in the past and they thought they weren't driving their own cases and felt that they would be sitting there and their barrister would be speaking before the court and they'd be wanting their barrister to say something entirely different and they felt ignored. (McKenzie Friend interview)

### *Committed to a case/an ally*

Having a shared identity, or affinity, with a McKenzie Friend was reported by LiP clients as a factor influencing their decision to use a McKenzie Friend rather than a solicitor. As identified earlier, groups such as Families Need Fathers often appear to play a key role in developing links between prospective clients and their McKenzie Friends, whether through provision of online directories and discussion forums, or face-to-face at local meetings. The dimension of shared experience appeared to imbue the advice and assistance provided by a McKenzie Friend with a sense of authority in the eyes of some clients:

I think one of the things that impressed me is that he had gone through a divorce about the same time as I had and that he had come into this - because I had often thought, "goodness, you know, if I had have known what I know now... and perhaps someone should, you know, try and help people to know these sorts of things and we should just help each other out". So it seemed to me that [McKenzie Friend] had done exactly what I thought you know someone should do. (Client interview)

Indeed, a running theme in our client interviews was the ability of the McKenzie Friends used to appreciate the position that the LiP was in, be on the 'same wavelength' and empathise with their client's situation:

He absolutely understood my predicament where I'd come from, why I'd left the relationship. There was domestic violence. ... no one really listens to that, they don't believe that it happens to men.' (Client interview)

The strong link between fathers' support groups and some McKenzie Friends is highlighted particularly well in the following quote. This LiP client had undertaken a large amount of research and appeared informed about choosing a McKenzie Friend that suited their needs:

I sort of Googled and there were quite a lot who were sort of in with Fathers 4 Justice and I immediately went "Woo, no way". And I contacted a few because the websites were quite sort of bland. I wanted to see where they were coming from... What I was seeing online was, it seems that quite a lot of McKenzie Friends had a different agenda. Excuse my French but they'd been shat on and



they'd wanted to avenge themselves or something. ... the huge difficulty was to find the one I really got on with - I had to go through a lot. I had to separate the wheat from the chaff because the ones who advertise themselves aggressively, they are aggressive. And there are ones out there, they make claims over and above what they can actually provide. Like, somebody vulnerable, it's very easy to be sucked in by this. They make false promises and that, for me personally, that is a huge problem.... my biggest bugbear is trying to find one who doesn't have an axe to grind because it's not always apparent. I'm not saying that solicitors and barristers don't have an axe to grind but the thing is there is a complaints procedure to protect their client. (Client interview)

This interviewee highlights a valid concern over the prevalence of alliances with particular groups among the fee-charging McKenzie Friends population as a whole. Within any profession, some individuals will have alliances with particular interest groups that are of relevance to the work that they do; there are no doubt family law solicitors and barristers who maintain links of varying degrees with fathers' rights and support groups, or with other parenting groups. Such links need not be inherently problematic (though they are less troublesome in the context of regulated lawyers who are bound to observe duties to their clients and to the courts).

The problem here is that where a group of service providers appears to be dominated by individuals who are aligned with the identity or political agenda of a particular group, there is a risk that the outside world will perceive that type of service provider as an extension of a lobbying group, whether or not that perception is justified. That in turn raises doubts over how seriously the sector will be treated.<sup>68</sup> This, we suggest, is an issue for those within the paid McKenzie Friends sector wishing to develop and emphasise its professional credentials. The group is not likely to achieve broader credibility unless there is further (or at least more visible) diversification and/or professionalisation within it.

## 2.5 Conclusions

In exploring some characteristics, motivations and business practices of the McKenzie Friends included in this study, this chapter has revealed a mixed picture. Though concerns about agenda-driven McKenzie Friends might not be entirely misplaced, we have found that they are likely to be exaggerated and we have outlined evidence of positive inclinations towards intensive client-care, efforts to keep fees low, and professional development. This is not to say that we did not also find evidence indicating that some McKenzie Friends would do well to pursue more rigorous business management and client-care practices, in the interests of both themselves and their clients. As a group, paid McKenzie Friends appear to lack a cohesive approach to their work – although the seeds of an emerging professionalism might be buried in initiatives such as the SPMF and in the apparent appetite for relevant education and training.

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<sup>68</sup> See comments from the LSCP report expressing concern about agenda driven McKenzie Friends 'who deliberately set out to be disruptive or pursue a cause, with or without their client's consent ... [or] another category of individual who is motivated by their own negative experience and wants to help, but lacks objectivity and may inadvertently push a personal viewpoint on to the client.' Above, n 5, para 1.11.

The (apparently typical) informality of the McKenzie Friend/client relationship highlights a variety of concerns related to safe, efficient and reliable working practices in a number of instances. That said, the clients we interviewed depicted a situation in which the relative informality of McKenzie Friend services provided something qualitatively different (and, for many, preferable) to the traditional model of lawyer-provided legal services. This perhaps represents an uncomfortable challenge to the orthodoxy surrounding the superiority of services provided by lawyers. But, whereas one might justifiably question the capacity of litigants to compare the quality of *advice* given by qualified professionals and unqualified McKenzie Friends, it is more difficult to dismiss a litigant's assessment of the quality of *service*.<sup>69</sup> Added to the information we were given that suggests fee-charging McKenzie Friends can be a substantially cheaper source of support than lawyers for litigants, all this indicates that one should be slow to discount their potential value, particularly in the post-LASPO environment.

### Key findings

- In terms of motivation, the fee-charging McKenzie Friends in our sample fall into one or more of the following categories, with the first category demonstrated most commonly: i) The business opportunist; ii) The redirected specialist; iii) The good Samaritan; iv) The family justice crusader; v) The rogue. We saw limited evidence of McKenzie Friends belonging to the fifth category, though further evidence from outside the study supports its existence.
- The LiPs we spoke to chose fee-charging McKenzie Friends to support them for reasons of affordability, flexibility, shared experience and having a committed 'ally' assisting them in their case. Most gave positive accounts of their experience of using a McKenzie Friend.
- Although we saw limited evidence that McKenzie Friends are frequently agenda-driven, the prevalence of affiliations with certain organisations within the McKenzie Friend community might raise questions about the extent to which this source of support is available on a gender-neutral and client-centred basis.
- McKenzie Friend business practices appear to vary in quality and rigour. The take-up of professional indemnity insurance and registration with the Information Commissioner's Office, whilst requirements for members of the SPMF, were not adopted widely by others. Protection for LiP clients of McKenzie Friends in these respects is therefore patchy.
- There was a mixed approach and attitude to complaints handling and potential risk issues – for both the McKenzie Friends themselves and their LiP clients. There is a lack of protection for LiP clients who have a complaint and there are very limited avenues of redress available to them.

<sup>69</sup> This distinction is noted as important and discussed at length by the CMA (2016), above n 20, chapter 3.

### 3. The hidden depths: work done outside of court

Previous commentary has noted that the work of fee-charging McKenzie Friends extends far beyond their originally-conceived role as supporters providing moral support and quiet advice in the courtroom.<sup>70</sup> To date, however, the majority of discussion and commentary about McKenzie Friends has focused on their in-court role. The LSCP noted that the ‘extended role’ encompasses advice and practical support outside of the court environment but gave little by way of detail on this extended role.<sup>71</sup> The Hickinbottom report defined the extended role of McKenzie Friends according to the exercise of rights of audience and the conduct of a litigant’s claim.<sup>72</sup> The recent proposal, presented in the Lord Chief Justice’s consultation on McKenzie Friends, to prohibit recovery of fees for work connected with a case in which McKenzie Friends appear in court did not explicitly address the significance of this factor. Moreover, their further suggestion that McKenzie Friends should be renamed ‘court supporters’ indicates a narrow, orthodox characterisation of the nature of the role.<sup>73</sup>

In short, the role of McKenzie Friends as out-of-court legal service providers has received very little attention, but has the potential to impact on litigant welfare and the administration of justice in ways as important as in-court assistance. This chapter begins to fill the gap by examining the work that fee-charging McKenzie Friends undertake *outside* of the court and will suggest that their court-based work is best characterised as the tip of an iceberg compared with the work many report that they do to support and assist their clients outside of court. In the second part of the chapter we consider (to the extent that we are able) what our data reveals about the competence and appropriateness of the work McKenzie Friends do in their extended out-of-court role.

#### 3.1. The scope of ‘the extended role’

And what I find that clients want from me, which is the bit I like about it the most actually, is they want direction and they want strategy and they want to know where we’re actually going with this and that’s kind of been the bit of the job that I have always tended to prefer and favour. (McKenzie Friend interview)

So, we’ll get people who say, “Look, this is a 20 page application form, for the life of me, I haven’t got a clue how to fill it in”. So I might assist them with that. I might – and then they would get their notice of proceedings, and you would assist them to put together a position statement. You would give them advice as to what the format was on the first hearing dispute resolution appointment, what the options were, what they might be, what directions they might be seeking from the court. And through to the ongoing stages, in terms of their statements,

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<sup>70</sup> LSCP, above, n 5, pp13-14.

<sup>71</sup> Ibid, pp 13-14.

<sup>72</sup> The Judicial Working Group on Litigants in Person: Report (2013), above, n 2, para 6.12.

<sup>73</sup> Above, n 18, pp 12-14.

discussions with Cafcass, advice as to Cafcass role, that sort of thing. So the whole ambit really, from beginning to end. (McKenzie Friend interview)

These quotes emphasise a key finding of this research study: that, amongst those McKenzie Friends we interviewed, the bulk of the work is done outside of court. Their out-of-court work is far-reaching and practically oriented, often encompassing tasks such as:

- Assistance with paperwork and correspondence;
- Legal advice and information;
- Managing expectations and advising on strategy;
- Facilitating settlement.

As indicated in one of the quotes above, some McKenzie Friends appear much more comfortable in this unseen support and advisory capacity than they are in the court environment. Indeed, a minority of McKenzie Friends said they actively deter their clients from using the court process at all, and as such rarely do any work in the court environment. When discussing their most recent case, one McKenzie Friend highlighted that the court may not even be aware that a LiP has a fee-charging McKenzie Friend in the background assisting them with their case:

I gave her the advice, filled out the forms, helped her with the statement, she went to court on her own because I told her what to do. She has got an injunction, got a hearing on [day] - again I have told her what to do so I'm not travelling to [court] I am just giving advice and assistance. (McKenzie Friend interview)

This example also speaks to the difficulties associated with identifying and logging fee-charging McKenzie Friend involvement in a case, which will be discussed further in the next chapter.

### **3.1.1 Paperwork**

Interview data from McKenzie Friends and clients suggested that a major feature of fee-charging McKenzie Friend work is assisting with documents and paperwork outside of the court hearings. This can begin right at the outset of the process with court application forms, something that most McKenzie Friends expressly or impliedly said they assisted with.

We also heard many accounts of assistance with the preparation of documents required for court hearings, such as position statements, disclosure forms, skeleton arguments and questions for use in cross-examination, as well as bundles. The ability to manage and present the necessary paperwork in court was identified as a big challenge for LiPs in Trinder et al's study.<sup>74</sup> We were not able to examine examples of documents prepared by McKenzie Friends in this study, but we did hear enough about the rules of thumb applied to paperwork preparation to make us confident in inferring that their work in this area can be useful. For example, this McKenzie Friend was typical in saying they encouraged their clients to make the position statement as brief as possible: "I

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<sup>74</sup> Above, n 4, ch 3

have a two page rule, it's supposed to be skim readable, you know, it's just to give the court a flavour or a highlight of who is who, what is what and what do they want."

Several McKenzie Friends emphasised the benefits of position statements as documents that can help focus the minds of their clients on the issues at hand and also give them confidence when they appear in court, "because as a litigant in person they may feel tongue-tied before a court and they can hand that [the position statement] over". Additionally, some McKenzie Friends spoke of having a role in tempering what went into court documentation by encouraging restraint in relation to issues LiPs held strong emotions on, as well as ensuring that key issues were focused on. All this appears likely to result in paperwork that is more manageable in content and volume than what many LiPs would produce themselves.

LiP clients in both freestanding and linked observation interviews gave positive feedback on the assistance provided by their McKenzie Friends with case-related paperwork. The following quote not only provides an example of the type of paperwork assistance provided to clients but also highlights the value clients interviewed placed on this work:

One of the things I was most impressed with the McKenzie, is his ability, especially writing a statement. What I did, I had to obviously draft out history about what happened in relation to my separation, and [McKenzie Friend] had to revise my statement in a format that courts require. The court would say, shouldn't be more than, I think, one or two pages and he knew all this. I still have copies of the statements and they're second to none. (Client interview)

Similarly, we heard accounts of McKenzie Friends helping clients to put their bundle together and label it meaningfully, rather than letting them take in "their Tesco carrier bag for life with all the documentation in", as well as ensuring it does not exceed the maximum number of pages permitted.<sup>75</sup> Even a McKenzie friend who did not like putting together bundles described an approach that is likely to be practically useful to most LiPs:

Well I say to my clients [I try] to avoid doing bundles if I can. I'll send people links to how to prepare their bundle. If they've got any questions then I'll answer them. If they're obviously not capable of doing a bundle and don't have the equipment then I'll do that but it's not something that I would normally want to get involved with. It's quite time consuming. (McKenzie Friend interview)

Beyond the court paperwork, it seems that the McKenzie Friends we interviewed commonly assist LiPs in drafting correspondence with efforts to encourage focus on relevant issues and to discourage the spilling of emotions onto the page also being made in this area:

And things about, you know, if I had an email and we were corresponding by email only at this point with my ex-partner, you know through the tone of the

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<sup>75</sup> Family Procedure Rules 2010 Practice Direction 27A Family Proceedings: Court Bundles (Universal Practice to be applied in the High Court and Family Court).

response I should adopt - move - to a point where it's a sort of dispassionate tone and this is a, you know, effectively it's a business problem... Yeah and other things like, you know, don't be sort of passive-aggressive in your emails you know avoid use of these words, use of those words. (Client interview)

### 3.1.2 Managing expectations

Managing a client's expectations is a key feature of a lawyer's role, especially on the route to settlement.<sup>76</sup> Many of the McKenzie Friends in our sample indicated that they tried to moderate their clients' requests and manage their expectations, particularly in the run-up to court hearings.

Right from the outset, I will try and readjust people's expectations to a realistic outcome. (McKenzie Friend interview)

Some felt that it was part of their role to impart unpalatable advice to LiPs, even if they did not want to hear it:

I will say to them, look you're free to ignore or take my advice, you can take my advice and shove it up your backside. Doesn't matter, it doesn't matter, but this is what I am advising you to do. (McKenzie Friend interview)

One McKenzie Friend suggested that they emphasise to clients that they should always make child arrangements applications on the basis of the best interests of the child, whilst another indicated that they would try to persuade the client to look at the dispute from the point of view of the children, rather than becoming locked into a battle mentality with an ex-partner:

I feel fairly comfortable about going, "Well, there is another way to look at it and perhaps if you were to change your perspective or change your position on things that you might get better outcomes for your children". (McKenzie Friend interview)

In chapter two we highlighted the reasons why the LiPs we spoke to chose fee-charging McKenzie Friends over solicitors. Whilst the overriding driver was cost and affordability, the informality and approachability of a McKenzie Friend and their perceived commitment to the client's case were also cited as significant. Trust that their McKenzie Friend had their best interests at heart was tacitly demonstrated by clients who clearly acted upon the unpalatable advice they received:

[McKenzie Friend] said look, you're not going to win this. What I'd suggest you do is just roll with it and then, you know, your eldest is almost 17, the second one is almost going to be 16, and the youngest - you will just have to take it as it goes... So that was some, I guess, very unpalatable advice but I followed it. Sometimes I wonder whether it was a good thing but I think it was good advice at the time. (Client interview)

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<sup>76</sup> For example, see E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: financial settlement on divorce* (University of Bristol, 2013) on settlement issues in financial remedy cases.

We went through stuff; we worked out a narrative for the day. He set my expectations pretty low. He said, “The chances are,” he said, “this is what you’re gonna get out of your hearing,” which is every other weekend and half the holidays. Which is pretty much dead on what I got. (Client interview)

### 3.1.3 Supporting settlement

Where appropriate, settlement is encouraged within the family justice system.<sup>77</sup> Consistent with the efforts to reduce conflict described above, all of our McKenzie Friend interviewees suggested at some point that settlement activities were an element of their work, and a sizeable majority described themselves as being highly pro-settlement:

Obviously we always work on the principle that we want to try and negotiate, we prefer the consent or we prefer people to work together... I said if we go for the gladiatorial style you know you’re far more likely to end up in another case in the future and I said that’s not good. (McKenzie Friend interview)

Yeah, I mean personally I don’t see the point in just battling things out for the sake of it in court. I don’t see the point in that so, my natural disposition is not to be in court. Which may sound a bit strange from a McKenzie Friend, but I always try and encourage them to be conciliatory whether it’s in finances or children matters. (McKenzie Friend interview)

In some cases, legal advice was reported to be given as part of the process of guiding LiPs towards settlement:

I do try and help them do it themselves, I will send the welfare checklist to parents that are going through the Children Act cases and, “this is what the court are going to decide it on, this is how it works”. Same with matrimonial – send them the Section 25 factors, “this is where you are, this is what’s taken into account: you’re on cloud cuckoo land – stop this now! The deal is not bad, I would suggest maybe you’d look at taking it and don’t put yourself through this final hearing”. (McKenzie Friend interview)

Reinforcing the McKenzie Friend accounts, two clients recounted experiences of a McKenzie Friend guiding them to an agreement on the basis of which they avoided going to court altogether.<sup>78</sup> In pursuit of the settlement agenda, some McKenzie Friends also said they participate in drafting consent orders, like this one who reported working from templates:

Well there are lots of different templates that I have seen from clients who have come to me. And textbooks. And I will ask a client to write down what they want, as in their consent order or, write out what the terms are, and I’ll just type it out for them in legal language. And then on one occasion when I was in a hearing a judge said to me, for my client, “Well can’t you go out there and draft out the

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<sup>77</sup> For example, Ministry of Justice, Transforming our justice system: summary of reforms and consultation (Cm 9321, 2016), para 1.5.

<sup>78</sup> Interestingly, these agreements were said to have stood the test of time – four years in one case.



consent order?” And I said “No I can’t, I haven’t got the template with me.” So he said “Well” you know “come back when you’ve done it”. (McKenzie Friend interview)

For the most part, however, those who did mention consent orders were reluctant to get involved in drafting them. One McKenzie Friend said that they tend to assist clients where the other party has a solicitor so the solicitor will end up drafting any consent order, whilst another McKenzie Friend said they used a former colleague (a non-practising solicitor) to draft any orders. Yet another McKenzie Friend said they either direct clients to go to an ‘accredited mediator’ who can draft the order, or suggest that they pay to get the order drafted by a solicitor.

A large number of our McKenzie Friend sample also reported that they actively promote mediation when clients first come to them. The promotion of mediation and the settlement orientation are not entirely without problems,<sup>79</sup> but they are deeply embedded aspects of the current orthodoxy in relation to family proceedings and many McKenzie Friends seem to be well in-step with that reality. Of course, this was not applicable to all interviewees, and a couple of McKenzie Friends did not mention taking any proactive steps towards settlement or mediation.

### 3.1.4 Legal advice

The provision of legal advice is not a reserved legal activity under the Legal Services Act 2007. In our interviews with McKenzie Friends and clients the advice that paid McKenzie Friends gave to their clients reportedly varied from the provision of individualised legal advice to the provision of legal information only, to a refusal to say anything about the law.<sup>80</sup> Accessing tailored legal advice is one of the greatest needs that LiPs have, but it is often an unmet need in the post LASPO environment.<sup>81</sup> There is reasonable debate to be had about whether McKenzie Friends can appropriately provide services to meet it. On the one hand, the need is great and McKenzie Friends are technically free to give advice. On the other hand, giving legal advice is arguably a highly-specialised, high-risk activity.<sup>82</sup> This may be particularly the case in children cases where mistakes might impact on patterns of parenting, contact and residence in ways which are not easily corrected after the event. The risks to clients of presenting and defending unreasonable positions are high and the administration of justice is potentially threatened by the pursuit of unmeritorious cases. Most McKenzie Friends we spoke to, as shown in chapter 2, do not have formal legal training.

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<sup>79</sup> See, for example, L Smith and L Trinder, ‘Mind the gap: parent education programmes and the family justice system’ [2012] 24(4) Child and Family Law Quarterly 428-451.

<sup>80</sup> For the purpose of the following discussion, we define ‘individualised advice’ as advice about the law that is tailored to the specific issues in a person’s case, and ‘legal information’ as general neutral information, which may include an abstract overview of the current law and procedure and a description of options open to the client. For further discussion of the various approaches to information provision in a mediation context, see Hitchings and Miles, ‘Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum’ (2016) 38(2) Journal of Social Welfare and Family Law, 175.

<sup>81</sup> See Trinder et al, above n 4. Pro bono and University law clinic schemes are limited in capacity and unevenly distributed, and the Personal Support Unit does not provide legal advice.

<sup>82</sup> The rationality of the exclusion of legal advice from all forms of regulation (as distinct from reservation) is touched upon by S Mayson and O Marley, *The regulation of legal services: what is the case for reservation?* (Legal Services Institute, July 2011) and by the CMA, above, n 20.

A number of the McKenzie Friends we interviewed were very open about the fact that they provide individualised legal advice to their LiP clients:

I am giving legal advice ... I'll tailor [the legal advice] to the case, always tailor everything to the case.' (McKenzie Friend interview)

Citizens Advice Bureau ... do a lot of good but they cannot give the level of help and service that I can provide. All they can do is provide a little bit of advice at the start, a little bit of advice throughout; they can't help these people with the paperwork, they can't give definitive legal advice ... I'm a halfway house between full legal representation with all the bells on, as you would get with a lawyer, or the Citizens Advice Bureau, which is extremely limited. (McKenzie Friend interview)

One interviewee suggested that a large proportion of their non-court work was giving legal advice to clients while they were undertaking mediation and another that they would give legal advice to support clients in negotiating a settlement, at or away from courts:

They will be saying something and I will say to my client ... you can, or your right is this, or your right is that. Or I will say sometimes, actually that's not right... It is legal advice, yes. It's not just a feeling I have, it's based on what I understand the law is. (McKenzie Friend interview - on advising during negotiations)

What I do do, is prepare a mediation plan because if you're paying £250 an hour for mediation you need to, you're not going there for a bun fight and you need to have a very concise, again reasonable, proportionate plan of what you're looking for and then to tick them off. (McKenzie Friend interview)

A couple of other interviewees said that they did give advice but appeared sufficiently tuned into the risks involved in them doing that to require their clients to accept a disclaimer of sorts. So this McKenzie Friend expected clients to bear the responsibility for following any particular path:

We are giving advice, any advice we give you, you live with the consequences. You know, we can advise you but you're free to listen or disregard any advice we give you at any point. (McKenzie Friend interview)

This one went a step further, requiring clients to sign a disclaimer as part of the terms of business:

I have a caveat in my terms and conditions that says if I have to open up this book and look at case law and try and present case law then I am not liable for my interpretation of that and at that point I would advise a client that they need to go and speak to a barrister through their brilliant direct access scheme, because it is brilliant, I love it... I will assist people as an informed friend, an informed friend which means that I have a certain amount of protection if someone wants to come back and say you gave me the wrong legal advice, no I don't because you

signed my terms and conditions which explicitly says that I am not qualified to give legal advice. (McKenzie Friend interview)

Motivated by the same caution exhibited by this McKenzie Friend, some of our McKenzie Friend sample felt that providing legal advice goes beyond the remit of their role and simply reported that they do not do it:

I do see it [being a McKenzie Friend] as a role that I can do without taking legal qualifications because I'm not giving legal advice anyway, I am guiding people on how best to navigate through a system that would be alien to them without some guidance.' (McKenzie Friend interview)

Of these, a number said that, if legal advice was required, they felt it should be sought from lawyers:

The main thing is just to make sure they're aware you're not a solicitor, you can't give legal advice... and if there is anything where they think they need legal advice that, you know, that they really do need to consider getting that. (McKenzie Friend interview)

I think my role is to guide people and if they need legal advice then I tell them to go and get it and I won't work with them until they have. I certainly don't give legal advice because that's not my role. (McKenzie Friend interview)

### *The grey area*

The boundary between legal advice and information, or non-legal advice, is not a clear one. The following quotes highlight things that McKenzie Friends who did not claim to give legal advice did report doing. The emphasis is ours:

We don't deal with them as solicitors or barristers, we deal with them as people who need guidance but just provide them with information, just *provide them with the options ...The court is interested in moving forward rather than looking back. If there's domestic violence then obviously that's very important* and that needs to be highlighted to the courts and they can then put that into consideration. (McKenzie Friend interview)

...they want direction and *they want strategy and they want to know where we're actually going* with this... so when I meet somebody, I would be wanting to kind of *give them a kind of overview of where it may end up. Where it should end up.* (McKenzie Friend interview)

In addition, one McKenzie Friend vehemently rejected the idea that they gave legal advice but had a specific procedure in place for calculating what they would advise clients to seek in financial remedy cases, demonstrating that they effectively do provide legal advice by tailoring advice to their clients' cases. We did identify a tendency for some McKenzie Friends to recast advice relating to family law as non-legal:

I don't give legal advice, I give family law advice... If I come to family law and I have got a number of books of family law, if I have to open up a book and look at

[case law], then I am going into the realms of looking at legal advice. However, I am sitting there and going, “let’s take your case, where do we feel, what do we think are the physical, emotional, educational needs of your child?”. (McKenzie Friend interview)

This interviewee appeared to be suggesting that there is a difference between appreciating what the ‘law’ is and what is desirable and practical under the circumstances. There might be some truth in this position, but it appeared in part to stem from a belief that it would not often be necessary to look further than the statutory frameworks for finance and private law children cases that exist to guide courts in the exercise of their discretion when responding to the specific circumstances of each case. The notion that courts do not exercise that discretion within the parameters of extensively developed legal authorities, however, is misguided.

On the basis of what has been discussed in this chapter so far, we suggest that some McKenzie Friends fail to appreciate that they are walking a rather fine dividing line between providing legal information, or non-legal advice, and legal advice. Tasks such as presenting a summary of relevant case law, outlining the options available to a prospective litigant, helping the LiP to focus on relevant rather than irrelevant issues and advising on possible pathways and/or likely outcomes in a particular case are appropriately described as legal advice. These tasks entail the selection of salient information for presentation and as such demand interpretation and application of raw information about law and legal process – skills traditionally developed through traditional legal education.<sup>83</sup>

### 3.1.5 Avoiding undertaking the conduct of litigation

The right to conduct litigation is a reserved legal activity and is defined by the Legal Services Act 2007 as:

- a) the issuing of proceedings before any court in England and Wales,
- b) the commencement, prosecution and defence of such proceedings, and
- c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).<sup>84</sup>

A number of the McKenzie Friends in our sample showed some awareness of the need to avoid activities that might fall within the definition of the conduct of litigation and said that they are very clear with their clients about the type of activity that they can and cannot conduct.

I am not a practising solicitor and I am not allowed to conduct reserved activity. ... With the clients they are told at the very, on the very first phone call about the differences. That I am technically well in reality, helping them to represent themselves. (McKenzie Friend interview)

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<sup>83</sup> A similar argument is set out at length in relation to the role of mediators in M Maclean and J Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Oxford, Hart Publishing, 2016).

<sup>84</sup> LSA 2007, Schedule 2, para 4(1).

I've had the odd client where I have had to keep going back and they will say can you do this and I'm like, "no, I'm afraid I can't, I can't conduct litigation for you. I can tell you what you need to do and I can help you and I can draft for you but I can't call on your behalf, I can't telephone the courts, I can't speak to the other solicitors unless I'm given permission." (McKenzie Friend interview)

Among those who were conscious of the issue, there was some inconsistency and confusion, however, with the following McKenzie Friend demonstrating an understanding with regards to aspects of the reserved activities, but mistakenly assuming they encompassed legal advice:

[I]t is a fact in law that the Legal Services Act prevents a McKenzie Friend from giving legal advice, representing a client and conducting litigation, including the right of audience (McKenzie Friend interview)

Such confusion is entirely understandable. The statutory definition is vague - indeed, it has been described as 'singularly unhelpful'.<sup>85</sup> In recognition of this, useful guidance is available to barristers, summarizing the relatively narrow range of activities that are accepted as falling within the definition of conducting litigation and outlining grey areas.<sup>86</sup> In fact, the scope of conducting litigation is deliberately narrow, extending only to the 'formal steps' associated with litigation.<sup>87</sup> Nonetheless, the extant ambiguity over what qualifies as a formal step is particularly problematic for lay assistants who need to know with certainty what parameters should be placed on their work, so it is worth commenting on the main points of confusion we identified.

### Correspondence

One McKenzie Friend with a legal background explained that they would not write on their headed paper to anyone on behalf of their clients because that would amount to conducting litigation. Some McKenzie Friends said they would write or draft letters on their client's behalf, but then get the LiP to sign and post the letter themselves. Only one McKenzie Friend openly admitted to corresponding on behalf of clients:

.... you're not really, we're not supposed to, but the McKenzie Friend rules do actually state that you can assist peripherally in any way that the litigant in person needs you to assist.<sup>88</sup> So, loosely defined, we do what we do. We haven't had any major, major issues with it for the last five years. We've had a few people, a few judges question some of the paperwork that's been sent but they haven't said, they haven't said we're breaking the law. ... There is a lot of correspondence that goes out and we get paperwork back from court to us directly. They accept that we're assisting, they know we're McKenzie Friends. [Observation linked McKenzie Friend interview]

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<sup>85</sup> *O'Connor v Bar Standards Board* [2012] All ER (D) 108 (Aug).

<sup>86</sup> See the Bar Standards Board Handbook and The Bar Council, Role of barristers in non-solicitor cases, December 2015.

<sup>87</sup> See *Agassi v Robinson (Inspector of Taxes)* [2006] 1 WLR 2126 and *O'Connor*, above, n 85.

<sup>88</sup> It was not clear what rules this interviewee was referring to and we do not know of any that contain such an indication.

In the course of our court observations, comments from the judges in two separate cases indicated that a McKenzie Friend had exceeded the orthodox role because there was some correspondence on file using the McKenzie Friend's headed paper.

In fact correspondence (as distinct from the service of documents) does not fall within the scope of the conduct of litigation.<sup>89</sup> Those who draft correspondence but will not send it are perhaps tuned into an apparently blurry distinction between delivering documents to a court and issuing/filing them.<sup>90</sup> But that distinction relates to formal court documents, not general correspondence.

### *Preparing court documents*

In the case of *Re H (children)*,<sup>91</sup> the Court of Appeal appeared tacitly to endorse a trial judge's conclusion that a McKenzie Friend's contribution of 20% to the preparation of documents crossed into the territory of conducting litigation and was unacceptable. Given what we have reported about the nature of the extended role of McKenzie Friends outside of court, according to this judgment almost every McKenzie Friend we interviewed would fall into the conducting litigation bracket. The decision does not appear to have had much influence, partly because it was an appeal in which it was stressed that the court was reluctant to interfere with a first instance case management decision. It also appears to contradict higher authorities on the conduct of litigation being defined very narrowly.<sup>92</sup> The decision is also counter to the current Bar Council Guidance, which states that the "prohibition does not apply to documents which are ancillary to role of an of an advocate: e.g. skeleton arguments, case summaries, position statements, chronologies and lists of issues."<sup>93</sup>

One of our interviewees specifically mentioned the decision, however, and the existence of apparently conflicting authorities on the permissibility of an aspect of out-of-court work apparently undertaken by many fee-charging McKenzie Friends is troublesome.

## 3.2 Out-of-court tasks and McKenzie Friend competence

Of course, the significance of the above discussion in part depends on whether or not McKenzie Friends are able to perform tasks to a minimum level of competence. During the court observation stage of the research we noted two instances of apparently questionable strategic advice by McKenzie Friends. In one, the McKenzie Friend had encouraged the LiP to apply for an enforcement order notwithstanding strong evidence that the former partner was impecunious. Much of the hearing was taken up by the judge explaining to the respondent LiP how and why they should lodge a cross-application to vary the original order. In another case, it appeared from the observation that the McKenzie Friend had helped to facilitate the making of an inappropriate application in error.

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<sup>89</sup> See *Agassi* (above, n 87) confirming that 'delivering documents to opposing parties and the court' will not normally amount to conducting litigation. Further discussion can be found in The Bar Council, Role of barristers in non-solicitor cases, December 2015, p 11.

<sup>90</sup> *Heron Bros Ltd v Central Bedfordshire Council (No 2)* [2015] EWHC 1009.

<sup>91</sup> [2012] EWCA Civ 1797.

<sup>92</sup> For example, *Agassi* (above, n 87).

<sup>93</sup> Above, n 90, p 10.

We also heard some examples of McKenzie Friends giving advice in ways that were likely to be straining the boundaries of their abilities. In the following example, a McKenzie Friend describes making generalizations in an area of law that is notoriously difficult to predict, even for the experts – namely, spousal periodical payments:<sup>94</sup>

I had a woman recently was trying to do mediation with the husband, the husband was saying that because she is getting the house there is no way in a million years he's going to pay her spousal maintenance. ... I said I pretty much guarantee you there is no way that man is going to walk out of court without a spousal maintenance order... you will get spousal maintenance but it might be a pound, I don't know yet because I don't know how you're going to split the money up. You know, it might be a hundred pounds, it might be a thousand pounds a month. (McKenzie Friend interview)

Meanwhile, another McKenzie Friend gave an example of a recent case where they met the parties at court and then acted as a 'mediator' outside of court to try to encourage settlement:

I have also mediated between two parties, having met them in court. I'm not a mediator, I'm not trained but I have said to them, "look, you know, do you think the two of you can sit down with me and we can sort this out, and I'll charge you £60 each rather than five, six hundred quid between the two of you?" And they said yes, and I've come up with a draft consent order that will be sent to a solicitor to check and then they've been signed off. You know and I'm not, I'm not trained as a mediator but I can sit down with two reasonable people and say come on, we've got this. (McKenzie Friend interview)

Despite a lack of mediation training, this McKenzie Friend was very confident in their innate ability to act as a mediator. While the pragmatic and determined approach might seem commendable, the fact that a fee was charged for an activity that fell beyond the McKenzie Friend's existing experience is troubling, particularly if they had represented one of the parties previously (which was not clear from the story as told by the McKenzie Friend).

Other McKenzie Friends demonstrated more self-awareness in relation to their abilities, or lack thereof. Some emphasised that they would refer clients to other providers where necessary. For example, if they did not feel able provide a particular service, whether this was in relation to family law legal advice and the query involved a legal problem going beyond their knowledge base, or if the enquiry related to a different area of the law.

What I do is I will only take on things or deal with things which are in my remit of expertise. ... I get quite a lot of enquiries for wills and things, which is a little bit weird but maybe, I think, some people think family law is like the traditional sense of the family's lawyer, you know. So I've got a, you know, a couple of solicitors I always send those enquiries to. The same with, you know, often

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<sup>94</sup> See Matrimonial Property, Needs and Agreements (2014) Law Com No 343 where the Law Commission reported on the regional difference in the duration of spousal periodical payments (para 2.45-2.53). This is a clear example of an area of private family law in which it is difficult to give absolute advice.



sometimes I might get a phone call from somebody who it's effectively like a property dispute, you know, they jointly own a house but there is no issue over, they're not co-habiting or anything and of course that's not my bag so I would send them to somebody else who deals with that. (McKenzie Friend interview)

Consistent with this, it is worth recalling that most of the McKenzie Friends we spoke to said they specialised in family law cases, and the main, or even exclusive, focus for a majority was child arrangements. In certain respects this is unsurprising; the main source of client recruitment for many is through parenting networks and there are in any case a larger number of child arrangements cases compared with finance cases in the courts.<sup>95</sup> However, some McKenzie Friends suggested that their focus on child arrangements was the result of a deliberate decision resulting from recognition that the substantive law related to financial remedies is more technical and they lacked relevant training and expertise. With the odd exception, finance work was undertaken by the more experienced interviewees, or those who had some previous relevant training. As such we have some evidence that some McKenzie Friends do self-consciously limit the range of work they do according to what they judge their capabilities to be.

### 3.2.1 The 'vignette' exercise

This study was not designed to provide an objective measure of the quality of McKenzie Friends' work. We did not observe McKenzie Friends working outside of the court environment or review paperwork that McKenzie Friends had assisted with; in relation to out-of-court work we were reliant on the views and perceptions of interviewed McKenzie Friends and clients (the latter being, as the CMA acknowledges, ill-equipped to judge the quality of services received in an area as specialised as legal advice).<sup>96</sup> As such, we are limited in the extent to which we can comment on how well equipped fee-charging McKenzie Friends are to carry out the work they undertake in terms of knowledge, skills and experience.

However, we did ask the McKenzie Friends we conducted freestanding interviews with to respond to a hypothetical vignette,<sup>97</sup> which was designed to replicate a relatively common child arrangements scenario. The vignette primarily served as a tool for exploring how the McKenzie Friends would approach a request for help, and what issues they would consider to be important when assisting a LiP in such a case. It was not deployed as a test, or as a means of benchmarking McKenzie Friends against lawyers, and as such it did not require a recall of case law, or specific legislative provisions, or predictions of a likely outcome. It did include scope to relay familiarity with the basic procedure for dealing with a child arrangements case. The responses to the vignette enable us to draw some inferences about the extent to which those we interviewed were tuned in to issues that are likely to be of importance to the cases of the LiPs they assist.

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<sup>95</sup> See Ministry of Justice, Family court statistics quarterly. Family court tables: July to September 2016. London: Ministry of Justice (2016). Retrieved from <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2016>

<sup>96</sup> The CMA describe the barriers posed to assessments of quality of legal services as a result of 'information asymmetry' between provider and consumer. See CMA (2016), above n 20, chapter 3.

<sup>97</sup> See appendix 1.

The issues covered in the vignette, some of them implicitly rather than obviously, included those that Trinder et al identified as common problems that LiPs struggle to present at court:<sup>98</sup>

- A potential risk to child safety involving both the need for a safe environment for contact and an allegation of drug use;
- A potential domestic violence history;
- Issues related to potentially poor advice from informal sources and the confidential nature of family proceedings;
- The purpose and structure of a First Hearing Dispute Resolution Appointment;
- The role of Mediation Information and Assessment Meetings.

And, less obviously, but potentially:

- Drug testing protocols and section 7 welfare reports.

The use of vignettes in an interview situation has its limitations (i.e. people being put on the spot with limited time to think) and we did not expect any McKenzie Friend to address all these issues. In fact, of the McKenzie Friends that responded to the vignette,<sup>99</sup> the majority addressed most of the main issues raised by the scenario, with the only issue commonly unidentified being the potential domestic violence risk.<sup>100</sup> As in the example below, many interviewees were able to identify general strategies for dealing with the problem and to outline the likely procedural development of the case reasonably accurately and comprehensively (i.e. involvement of Cafcass prior to and at the FHDRA; whether section 7 welfare reports would be ordered and, if so, the implications of these; movement towards settlement; and suggested strategies for dealing with contact):

I use the Cafcass site quite a lot when they are first starting out. I will send them a parenting plan, what the Cafcass and the court recommends. I'd highlight what's going to happen at the first appointment, if they're going to go on their own. I'd make them aware of the Cafcass safeguarding letter that's going to come out in which case the marijuana use would possibly be flagged up if there was any reports. ... So obviously her main concern is the safety of her child which she has to adhere to. And I would explain that Cafcass will contact her and him and then they will also meet the Cafcass officer before they go in to see the judge when they're at court on the first hearing. And to let her fears be known then to the Cafcass officer, who will obviously subsequently go and do a Section 7 report. (McKenzie Friend interview)

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<sup>98</sup> Trinder et al, above n 4.

<sup>99</sup> 15 interviewees responded to the vignette. In most of the interviews where the vignette was not discussed, it was not possible to do so due to time constraints. However, in one interview, the McKenzie Friend declined to respond to the vignette as they distrusted the researcher's reasons and were worried about how their responses would be interpreted.

<sup>100</sup> This was only subtly implied in the facts and it is worth noting that a tendency to marginalize risk concerns has been observed on the part of professionals within the family justice system generally. See for example Trinder et al, above, n 4, and L Smith and L Trinder, above n 79.

We did not encounter any clear errors related to law or process in the vignette responses and, on the whole, most interviewees demonstrated basic procedural knowledge at a level that we felt would enable them to give some useful advice to a LiP. As shown in the above quote, there was potentially an over-optimistic forecast of the likelihood that the court would order section 7 reports or drug testing on the part of some. But there are no hard-and-fast rules on these issues, and it is possible that solicitors might request them to further their client's case.

What we did find was that the broader the range of specialist areas in which the interviewee undertook McKenzie Friend work, the more limited and problematic were their responses to the vignette. The minority of McKenzie Friends interviewed who were willing to take on a wider range of cases, including civil and criminal work appeared, on the whole, less tuned into the range of legal and procedural issues raised by the vignette. In at least one instance, the level of basic procedural knowledge was lower than we think it ought to have been for a McKenzie Friend who provides some of the 'extended role' tasks outlined earlier. One respondent was only able to identify two issues from the vignette without any additional prompting from the interviewer (the involvement of Cafcass and the need for a safe environment for contact). After prompting, this interviewee was able to talk to some of the additional issues but the discussion was not particularly detailed or on point.

### 3.3 Conclusion

The range of out-of-court tasks that fee-charging McKenzie Friends assist LiPs with is extensive, and appears to constitute a far greater proportion of the work they do than the time they spend in court. It might be tempting on the basis of these findings to assume that fee-charging McKenzie Friends are operating as a sort of quasi or substitute solicitor. This would be an easy comparison to make. McKenzie Friends are certainly assisting with many of the tasks traditionally undertaken by solicitors and, as the CMA, has noted, "the narrow scope of the majority of the reserved legal activities allows unauthorised providers to work around many of them in order to provide a service that is as close as possible to that offered by authorised providers".<sup>101</sup> We would recommend that the comparison is made with caution, however. Many McKenzie Friends do, whether through personal choice or recognition of an obligation to comply with the rules as they perceive them, place limits on what they do; thus the metaphor of the 'halfway house' was invoked in summary of the fee-charging McKenzie Friend's role by three of our interviewees. Furthermore, the intensive and distinctive emphasis on a particular type of supportive client care that was described in chapter 2 should not be forgotten.

The 'mixed bag' is as much in evidence in the way that fee-charging McKenzie Friends approach their work as it is in their backgrounds and business practices. However, as a group they exhibit consistency and more widespread sympathy with the tenets and orthodoxies of the current family justice system (in relation to settlement and focusing on children rather than conflict, for example) than might be imagined. Further research would be required to inform a more detailed and generalizable conclusion on the quality and value of the out-of-court services that McKenzie Friends provide. However,

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<sup>101</sup> CMA, above n 20, para 6.67.

we think we discovered enough tentatively to suggest that assistance from many of those we interviewed and observed could go some way towards remedying some of the key disadvantages that LiPs experience when trying to manage their own case. The majority that we spoke to also demonstrated some sensitivity to the limits of their abilities.

The Legal Services Board has speculatively predicted that the call for McKenzie Friends' services would fall away were a prohibition on fee-recovery for assistance with a court case to be introduced.<sup>102</sup> We doubt that fee-charging McKenzie Friend services would fall away because so much of their work does not take place in court and there has always been a substantial cohort of people who seek advice for a family law dispute but do not proceed to court. This assessment is not to ignore the evidence that some McKenzie Friends can be unprepared in their performance of certain tasks that require special skills or better legal knowledge. On the contrary, we think there is a case for clarifying the parameters of what McKenzie Friends may and may not do, and for efforts to be made to develop norms of professional practice that might circumscribe some of the less impressive behaviours.

The lack of (virtually) any clearly defined parameters on the role of a McKenzie Friend effectively means that they are characters in search of an author in relation to their out-of-court work. The range of work performed by a McKenzie Friend can expand and contract, up to the limits of an individual McKenzie Friend's comfort zone, in accordance with whatever need (or opportunity) appears to present itself. In such an environment, improvisations and forays into areas that ought to be keep-clear zones are very easy.

Overall, our assessment, based on the evidence we have, and as we will see in Chapter 4, is that many clients can probably do better in terms of being able to present and settle their cases with the assistance of McKenzie Friends than they would do on their own. That is, of course, not the same as saying fee-charging McKenzie Friends are necessarily as capable as lawyers or more or less helpful than lawyers would be presented with the same cases. For reasons outlined earlier, that comparison cannot be made and should not be made from this research. We also saw examples of rarer, and on the whole not serious, failings or weaknesses in the approach of McKenzie Friends. When understanding how to deal with McKenzie Friends in policy terms one has to ask not just whether in general things are better for clients with McKenzie Friends but also whether the apparently occasional, and perhaps very occasionally serious, risks posed to litigants, opponents and the administration of justice are worth the benefits of their assistance. This is a more complicated calculation, and one where a much harder look at the outcomes of advice and settlement provided by McKenzie Friends away from the courts would need to be conducted. Whilst the regulatory hook for such interest might be concern about litigation as a reserved legal service, in reality the concern is broader: how cases are progressed and settled is the key issue and that can take place outside the scope of legal services regulation entirely.

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<sup>102</sup> LSB, above, n 21, p 12.

## Key findings

Of the McKenzie Friends we interviewed and observed:

- Paid McKenzie Friends undertake a wide range of tasks outside of court, which appear to constitute the bulk of their work, though individuals vary in terms of which tasks they will perform and in the extent of the support they provide.
- The type of out of court work that paid McKenzie Friends undertake includes assisting with the preparation of paperwork, managing a client's expectations and advising on options and potential outcomes.
- Almost all McKenzie Friends give legal advice of some sort, though not all of them define it as such.
- Most McKenzie Friends say they actively promote settlement and/or mediation as more desirable than court.
- Most McKenzie friends appear to possess basic procedural and substantive knowledge in relation to child arrangements issues and it seems likely that this would enable them to improve the ability of the average LiP to manage their case.
- There are examples of exceptions to this rule, with a minority of the McKenzie Friends we encountered showing evidence of errors or questionable judgements, or demonstrating misunderstandings.
- There are some ambiguities around the limits of the conduct of litigation as a reserved activity and this impacts on the out-of-court work some McKenzie Friends do. However, the rules around the conduct of litigation do not appear to greatly limit the work of McKenzie Friends.

## **4. The tip of the iceberg: In-court activity for the fee-charging McKenzie Friend**

As we established in the previous chapter, the majority of work undertaken by the fee-charging McKenzie Friends in the study was reported to take place outside of the court building. It is nevertheless the work that McKenzie Friends do in the court setting that has most concerned commentators. In this chapter we draw on data collected during court observations, as well as interviews with McKenzie Friends and clients, to examine the work done by McKenzie Friends when they accompany LiPs to court and the ways in which that work might affect court proceedings.

One of the key methodological challenges in this study was identifying private family law cases in which fee-charging McKenzie Friends would be present. There is no system-wide mechanism for identifying in advance of a hearing whether a LiP will be assisted by a McKenzie Friend, and there might be nothing on a case file to indicate that a McKenzie Friend has been involved. The strategy we adopted was to spend a planned number of research days in family courts with high case loads and work with ushers to identify eligible cases as McKenzie Friends signed in for listed hearings upon arrival at the court. This was pragmatic but inefficient; there was always a high likelihood that we would not encounter any cases involving paid McKenzie Friends on several of the days we attended the courts and, even when we did identify eligible cases, it was necessary to obtain consent from each party before we could observe hearings. In total we encountered 14 cases involving fee-charging McKenzie Friends over the course of 34 days spent at five different courts.<sup>103</sup> We were able to observe hearings in seven of those cases.

Insights drawn from direct observation of the work of McKenzie Friends, as opposed to self-reporting by them and recall by their clients, are obviously highly valuable. However, data derived from a sample of this size must be treated with an appropriate degree of caution. As far as possible we have triangulated the data yielded by the observations and any linked interviews with data obtained through free-standing McKenzie Friend and client interviews. This enables us to situate the observations in a wider context. Where possible, we also obtained the sitting judicial officer's view on whether and why the observed hearing was typical or atypical of their experience of hearings involving fee-charging McKenzie Friends.

### **4.1 Fee-charging McKenzie Friends at court**

#### **4.1.1 Identifying the fee-charging McKenzie Friend at court**

In their 2011 report, the Civil Justice Council (CJC) recommended that courts should gather responses to a few standard questions about McKenzie Friends via a court notice in order better to exercise their discretionary powers in relation to them.<sup>104</sup> We found versions of the court notice suggested by the CJC in use at each of the five courts we visited, the theory being that they should be completed by LiPs and McKenzie Friends

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<sup>103</sup> Two of those cases were identified as having involved fee-charging McKenzie Friends after the event.

<sup>104</sup> Civil Justice Council, *Access to justice for litigants in person* (November 2011), chapter 11.

and submitted to the court prior to a hearing. However, there was variation in the approach to distributing, filing and scrutinising the notices.

In two of the courts we visited, the ushers we met proactively ensured that everyone signed in, distributed the relevant form, collected the completed form and passed it to the court clerk (where there was a court clerk in attendance). By contrast at two other courts, the ushers we saw did not consistently ask whether a party was accompanied by anybody else and so were not always involved in identifying McKenzie Friends; in these courts the LiP was expected to take the McKenzie Friend form into court rather than the ushers. In the fifth court the researchers observed different practices, with some ushers consistently checking who was representing or supporting a party and handing out the notice form for McKenzie Friends, and others not doing so. In such circumstances, the likelihood of notice forms being completed by every McKenzie Friend seems low. The overall inconsistency was summed up one McKenzie Friend following an observation:

There is a big variation. Yeah, well some of them ask you to complete that pro forma thing, but they're different in different courts as well. It's not even the same form ... But I never just rely on that. I always give a letter in which my client has signed and my C.V. attached to it. Whether they ask for it or not I just ask them to give it in. So that's, in some courts, that's instead of that form and other courts it's as well as. Some courts don't have forms at all. Some courts won't accept anything unless you send them in, in advance. (Observation linked MF interview)

As far as we could tell, a McKenzie Friend notice form was completed for five out of the seven hearings we observed. In the other two cases, the paid McKenzie Friends volunteered a CV and a letter outlining their status, which appeared to have been passed to the judge by the usher in both cases. However, it was not clear what happened following completion of the notice forms. Although each of the forms asked whether the McKenzie Friend was being paid, the judge indicated that they were not aware of whether the McKenzie Friend was fee-charging in relation to three of the observed cases. This might well signal the impracticability of judges with heavy lists checking the detail of any required documentation prior to a hearing.

It appears that it could be difficult to impose a failsafe system for completing McKenzie Friend notice forms. The reality of the physical spaces and demands of the courts we visited was such that ushers were not always permanently in attendance at sign in desks. If, as is often the case, many parties are signing in at the same time, and clerks are gathering sign-in sheets for hearings as they are called, the potential for some McKenzie Friends to be missed, or for completed notices to fail to make their way into the courtroom, will always be present.

Compounding the difficulty of tracking all McKenzie Friends in attendance is the challenge of identifying a McKenzie Friend in the first place. A number of McKenzie Friends described themselves, with varying rationales, using different terminology. In one of the cases we observed, the McKenzie Friend had used the term 'legal adviser' on the court sign-in sheet. In a second, a document was submitted referring to 'assistance



of a paralegal' not to 'assistance of a McKenzie Friend'.<sup>105</sup> In a third case, the McKenzie Friend had signed the sheet in the space allocated for a litigant's solicitor.<sup>106</sup> And in a fourth case, part of the hearing was taken up by a dispute over whether a paid McKenzie Friend had held themselves out as a litigant's solicitor.

Further complicating matters, there are occasional ambiguities in relation to whether or not a McKenzie Friend is fee-charging. For example, a party in one case was using a McKenzie Friend who was described as not fee-charging but who was paid to 'cover expenses'. It is difficult to judge whether this ought to be considered an example of a paid McKenzie Friend or not. Similar questions might arise where a McKenzie Friend expects a 'donation' or where a token of thanks given to the McKenzie Friend, with or without prior arrangement, effectively amounts to a payment in kind. To give examples from our freestanding interviews with clients, one indicated that he only 'paid' one McKenzie Friend with small but frequent gifts of consumable items such as cigarettes. Meanwhile another client described paying 'expenses' for a McKenzie Friend, who worked through a charity, to attend court, but they added up to £500.

On a similar point but of more concern, is the opportunity for fee-charging McKenzie Friends to dissemble their true status when they present at court. This opportunity was observed in one court, where one of the ushers identified a potential fee-charging McKenzie Friend case. The usher recognised the McKenzie Friend from their attendance in previous cases. However, when approached by the researcher, the McKenzie Friend insisted that they were a volunteer and did not get paid for their support. We have no basis for assuming, and are not asserting, that this was not true; there are certainly examples of 'repeat players' who do McKenzie Friend work through charities but do not charge fees. But the example, combined with our awareness that some McKenzie Friends are paid 'expenses' only or act for a 'donation', highlights the impossibility of establishing with certainty when a fee is being charged. Two McKenzie Friends also described how they might take steps to sidestep a potential ban on recovering fees for assisting with a court case:

If the law changes and they're not allowed to charge all that's going to happen is, I would charge you know £10 a sheet for photocopying... We'll just find another way of doing it... so you know someone just turns up with a friend or anybody else - how are you going to prove that?... The barrister doesn't tell the court in advance, 'I am coming in tomorrow to represent that person', it just doesn't happen like that. So he just turns up on the day, they don't go to the Bar section website and check that they're on the list... I mean you could just lie, I mean you walk in in a suit and big briefcase you could just bluff it. (Client interview – interviewee also now a McKenzie Friend)

The problem is ... that stuffs them because they've got all the thing about fee paying and fee charging - well my position is that, as a family law consultant, for the hour before I step into a courtroom, if I want to charge £400 an hour I can, because I am a family law consultant. But I don't charge a fee when I step inside

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<sup>105</sup> In interview, this McKenzie Friend explained that 'paralegal' was their preferred designation as they had some relevant legal qualifications and were a member of the Institute of Paralegals.

<sup>106</sup> It appeared that this was inadvertent and a CV was clearly on file for this McKenzie Friend, whose non-lawyer status was known to the usher and to the judge; there did not appear to be an intention to mislead.

the courtroom. And I've got a client who has signed a declaration to say that I am not charged whilst inside. How are they going to work that one out? (McKenzie Friend interview)

We comment on the hints at dissembling below. For now, a key question is whether courts could and should be more proactive in finding out about who is accompanying the LiP into the hearing and registering the attendance of a paid McKenzie Friend. This is particularly important as it speaks to the feasibility of any attempts at regulation, and/or restricting the activities of fee-charging McKenzie Friends in the courts.<sup>107</sup>

#### 4.1.2 The prevalence of fee-charging McKenzie Friends in private family law hearings

During the observation stage of the research, we were able to collect a small amount of quantitative data on the number of private law children and financial remedy hearings listed in each of the courts on the dates we were present for observation. With the assistance of ushers at the sign-in desks we noted, as far as possible, the number of cases involving a LiP and the number involving paid McKenzie Friends. Although the resulting data are not representative they give some sense of perspective on the prevalence of fee-charging McKenzie Friends assisting LiPs in the family courts.

*Table 3: Number of hearings involving LiPs and McKenzie Friends*

|                  | Hearings listed | Involving LiP | Involving paid MF | Hearings observed |
|------------------|-----------------|---------------|-------------------|-------------------|
| Private children | 606             | 325           | 12                | 5                 |
| Finance          | 240             | 41            | 2                 | 2                 |
| Total            | 846             | 366           | 14                | 7                 |

Fee-charging McKenzie Friends were found to be present in 14 out of 846 hearings, or in just under 2% of cases.<sup>108</sup> By contrast, 366 of the hearings (43%) involved a LiP. This suggests that work done by fee-charging McKenzie Friends in court is the tip of an iceberg not only in the sense that it constitutes only a small part of the work they do, but also in the sense that it appears to affect a very small fraction of private family proceedings.

<sup>107</sup> Such as the proposals to prohibit McKenzie Friends from charging fees for providing some types of support to litigants at court. Lord Chief Justice of England and Wales (2016), above, n 18.

<sup>108</sup> It is interesting to note further that the recent study of Litigants in Person in Private Family Law Cases (Trinder et al, 2014 – above, n 4) observed three fee-charging McKenzie Friends in a sample of 150 observed cases (2%). However, the purposive sampling used in that project means that the three McKenzie Friend cases would have represented a far smaller percentage of the total number of listed hearings in that study.

The way in which we recorded these figures means they are not failsafe and they should be treated as approximate rather than definite. However, it is interesting to note that the Legal Services Board recently found use of fee-charging McKenzie Friends to be similarly low. In their *Mapping Unregulated Legal Services* report, they found that fee-charging McKenzie Friends were used as the main provider to assist with a legal problem in only 0.07% of cases (from a sample of 5,512). Given the evidence that fee-charging McKenzie friends are most active in relation to family proceedings, one would expect a slightly higher rate of use in this area.<sup>109</sup>

In light of these figures, we tentatively suggest that a sense of perspective is needed when considering whether and how fee-charging McKenzie Friends should be subjected to further rules and regulation. Any issues that fee-charging McKenzie Friends do present are likely to be far less frequently encountered than the challenges faced and presented by unsupported litigants more broadly.

## 4.2. Support at court - how helpful were McKenzie Friends?

The seven observed cases highlighted a number of problems related to the work of McKenzie Friends at court, as well as a number of positive contributions. Here, we evaluate the contributions that the observed McKenzie Friends made to the court process through providing moral and practical support, assisting with negotiation and settlement, and in relation to rights of audience.

### 4.2.1 Rights of audience

Rights of audience are a reserved activity, to be exercised only by authorised individuals under section 12 and Schedule 2 to the Legal Services Act 2007. It is widely accepted that there are both sound public interest and consumer protection rationales for this restriction.<sup>110</sup> With regard to the public interest, the regulatory frameworks governing those with rights of audience impose duties to the courts that, as the Hickinbottom report noted, ‘are generally regarded as essential for the protection of other parties and to the proper administration of justice.’<sup>111</sup> Elsewhere it has been noted that it is perfectly legitimate – and, indeed, desirable – for rights of audience to be restricted to ensure ‘that only those who can be trusted to honour their duties to the courts are permitted to practise before the courts.’<sup>112</sup> In relation to consumer protection, the regulation of authorised individuals ‘provides a level of assurance as to the minimum quality and ethics of the provider’ that is arguably essential given the high stakes surrounding most advocacy and ‘that compensation after the event is likely to be an

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<sup>109</sup> LSB (2016). Above, n 21.

<sup>110</sup> For an exceptionally thorough discussion of the relevant arguments, see S Mayson and O Marley, ‘Legal Services: What is the case for reservation?’ (2011, Legal Services Institute). Broadly speaking, the arguments are reflected in seven of the eight overarching regulatory principles set out in the Legal Services Act 2007, section 1(1): (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services within subsection (2); (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

<sup>111</sup> The Judicial Working Group on Litigants in Person: Report (2013). Above, n 2, para 6.9

<sup>112</sup> Competition and Markets Authority (2016). Above, n 21, Appendix G3.

insufficient remedy in the event that a person's rights under the law are not upheld.'<sup>113</sup>

Courts retain a residual discretion to permit exercise of rights of audience by unqualified and unregulated individuals on a case by case basis.<sup>114</sup> The current Practice Guidance states that the grant of rights of audience to fee-charging McKenzie Friends, or those who seek to exercise such rights on a regular basis, 'will however **only** be granted in exceptional circumstances'<sup>115</sup> but it is reported that the courts are more flexible than this exhortation might suggest in practice. The Lord Chief Justice's recent consultation on McKenzie Friends reported that the granting of this 'discretionary right has become increasingly common'.<sup>116</sup> In the absence of any quantifiable data it is difficult to assess how common. What we can say is that there does not appear to be a consistent approach to rights of audience and the standard notice forms we saw during the court observation stage suggest a variable approach. The form in use at one court almost invites applications for rights of audience, asking 'If the Judge agrees, do you want the McKenzie Friend to speak for you at the hearing?'. Whereas the forms in use at other courts appear to discourage such applications by stating that a McKenzie Friend 'may not address the court make oral submissions or examine witnesses unless the Judge gives permission'.

The spectre of McKenzie Friends exercising frequent rights of audience appears to be one of the motivations behind the recent consultation on how the courts should respond to McKenzie Friends in future. This is hardly surprising, given the strength of the arguments for the reservation of rights of audience on the grounds of efficient administration of justice. Trinder et al's research into litigants in person in private law family cases identified a 'standard pathway', in which fully represented cases (the default position on which the court process is predicated) normally progress smoothly through the stages of a hearing on the basis of tacit understandings of the process.<sup>117</sup> As that study noted, the presence of an unrepresented party invariably disrupts that smooth process, thereby importing delay and effort. It stands to reason that the participation of an unqualified McKenzie Friend might be similarly disruptive (although a critical question for this argument is whether they are more or less so than the LiP alone).

Even if a paid McKenzie Friend with rights of audience is sufficiently capable not to hinder the flow of proceedings, it is understandable that he or she would attract the opprobrium of some professionals, who are authorised to exercise the right following considerable investment of time, effort and expenditure in training and under the supervisory auspices of their regulatory codes.<sup>118</sup> A neutral observer might be unconcerned by this. However, the policy calculus is not just whether McKenzie Friends exercising rights of audience disrupt or improve the handling of court cases, but whether the exercise of those rights also begins to undermine the regulation of advocacy more broadly. Put most starkly, if McKenzie Friends were permitted routinely

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<sup>113</sup> Ibid.

<sup>114</sup> Para 1(2) Schedule 3 Legal Services Act 2007.

<sup>115</sup> Above, n 2, para 23. Original emphasis.

<sup>116</sup> Above, n 18, para 2.3.

<sup>117</sup> Above, n 4, p 53.

<sup>118</sup> We note here that several of our McKenzie Friend interviewees stated that some lawyers respond very well to their involvement, though examples of lawyers being hostile were also reported.

to exercise, unregulated, litigation and advocacy rights then the legitimacy of legal services regulation might become seriously diminished.<sup>119</sup>

The Hickinbottom report claimed that ‘there has in recent years been a substantial increase’ in the number of paid McKenzie Friends *seeking* to exercise rights of audience.<sup>120</sup> If this is true, it is important for the purposes of perspective to recall that the ‘substantial increase’ is from extremely low baseline numbers. Our findings on this issue suggest a lack of consensus among McKenzie Friends on the appropriateness of seeking rights of audience. It is useful here to borrow from Trinder et al’s metaphorical description of standard (i.e. fully represented) court proceedings:

If one were to think of a court hearing as a stage play, the two lawyers would be the actors on the stage. They are at the centre of the action, doing all the stagework to present the play (their client’s case). The judge is the director giving some guidance on how the actors play their roles and ultimately deciding the future of the play, i.e. making a decision. The parties are the audience. They will have been briefed by their lawyers about what is likely to happen, much like reading a theatre programme. They are likely to review the play with their lawyer-actor afterwards. In the play/hearing, however, they are mostly watching, rarely acting.<sup>121</sup>

In this analogy, LiPs are effectively forced into the role of unrehearsed, untrained actor, often missing cues, intruding on the performances of others and/or adding unscripted melodrama. Based on our research, we suggest that the paid McKenzie Friend can play several functions that improve on this scenario to greater and lesser degrees. These roles are summarised in the following table.

*Table 4: McKenzie Friend approaches to Rights of Audience*

| McKenzie Friend role   | Features of the role   | Requests RoA:              |
|--|--|----------------------------|
| <b>The coach</b><br>(7 observed and/or interviewed McKenzie Friends)       | Orthodox role: moral support; taking notes; quiet advice on proceedings; preparing LiP prior to the hearing.                         | Never                      |
| <b>The understudy</b><br>(14 observed and/or interviewed McKenzie Friends) | As described for the ‘coach’, but:<br>1. If LiP struggles will support application for RoA;<br>2. Will step in if asked to by judge. | Occasionally – when needed |
| <b>The frustrated actor</b><br>(4 observed /interviewed McKenzie Friends)  | Repeated RoA requests; addressing the judge without RoA being granted.   | Frequently or always       |

<sup>119</sup> There is, of course, a case for arguing that the legitimacy of the current approach to legal services regulation in respect of the reservation of certain activities should be challenged in the post-LASPO environment in which litigants are less able to access support from authorised providers of the reserved activities.

<sup>120</sup> Above, n 2, para 6.8.

<sup>121</sup> Above, n 4, p 53

### **a. The restrained approach: McKenzie Friends as coaches**

As the table illustrates, the majority of McKenzie Friends we heard from did not see oral advocacy in the courtroom as an integral part of their role.<sup>122</sup> This reinforces the view that the Society of Professional McKenzie Friends (SPMF) recently reported to the CMA: ‘the typical model of a McKenzie Friend is that, for short directions or pre-trial hearings, the litigant exercises the right of audience personally, relying on prior guidance from the McKenzie Friend and prompting from the McKenzie Friend during the hearing.’<sup>123</sup>

In a hearing where the audience member has become an amateur player in the proceedings, the role of the coach is to assist them in performing this role to the best of their ability, rather than to perform themselves. Examples of this pure coaching role were seen in a number of the freestanding interviews where the fee-charging McKenzie Friend emphasised that they never ask for rights of audience. Our interviews with clients further support this finding, with a number of clients commenting that their McKenzie Friend had not spoken for them in court. It was not uncommon for clients to explain this by noting that McKenzie Friends are not allowed to speak in court, suggesting that the position had been presented very clearly to them in those terms.

Various reasons were given by McKenzie Friends who preferred to avoid rights of audience. For some, there was simply no need:

I don’t need rights of audience, I mean a lot of my clients are, you know, they are well spoken, they do a perfectly good job. There is no need. (McKenzie Friend interview)

A lot of people that I help... because of all those problems that they’ve got, they’d struggle to hold a conversation with a bus driver let alone a judge. So, yes, they would probably love me to represent them but actually I seldom do it because when you get into court you find that most people do ok. (McKenzie Friend interview)

Some did not view speaking in court as part of their role, while others did not ask for rights of audience because of their level of experience. At one end of the spectrum this included a new McKenzie Friend who did not feel they were experienced enough, while at the other end, a non-practising solicitor wished to maintain a clear distinction between their former role as a lawyer and new role as a McKenzie Friend. Others similarly described rights of audience as being outside the scope of their role. Other ‘coaching-orientated’ McKenzie Friends appeared more comfortable describing themselves as empowering LiPs to become more capable participants:

I also think that if you have a client who has been empowered to do their own case that after it they will be in a much more positive position, even if they didn’t get what they wanted, but psychologically they are in a stronger position to move on with their lives much quicker and I don’t think you need to underestimate the importance of that. (McKenzie Friend interview)

It would take a different study to assess reliably the extent to which paid McKenzie Friends are effective in empowering LiPs to improve qualitatively their participation in

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<sup>122</sup> This ‘majority’ combines the ‘coach’ and ‘understudy’ approaches.

<sup>123</sup> Above, n 21, para 13, Appendix G5

proceedings. As noted in chapter three, McKenzie Friend responses to our vignette scenarios did suggest that a majority had reasonable levels of procedural awareness that ought to be useful and reassuring when communicated to LiPs. In terms of what our observations added to that picture, the researchers felt that, on balance, the McKenzie Friend had a positive influence on the hearing process in four out of seven cases. In two of those four cases, the judge gave a similar assessment in informal comments after the case.<sup>124</sup> In one further case the impact of the McKenzie Friend appeared neutral (i.e. neither discernibly negative nor positive).

To add a further perspective, a number of the clients we interviewed argued that they *felt* more confident in court as a result of their McKenzie Friend's guidance and presence:

I felt I was still in control of the process. Yeah, I wouldn't be represented by them, I'd be representing myself as a litigant in person but then I'd have back up ... It surprised me, yeah, just going into the court - quite intimidating. It was more than I thought it would be. Quite intimidating, and very reassuring to have someone with me who knows the procedures. (Client interview)

Just having her there made me feel far more at ease that I was doing the right thing, and that I was armed with all the knowledge I had and all the knowledge she'd helped me ... It was just a matter of being more confident with her. (Client interview)

#### *McKenzie Friend use of direct access barristers*

According to the SPMF, 'When it comes to the final hearing or other substantial hearings which involve cross examination of witnesses and oral legal argument, the McKenzie Friend will often advise the litigant to engage a public access barrister for that one hearing, and may recommend a particular barrister for the task.'<sup>125</sup> Again, our data provides some support for this. More than half of our interviewed McKenzie Friends reported having recommended that their clients engage a direct access barrister (DAB) for particular hearings, with a couple stating that they do this routinely:

I am not trained in cross examination and there is no way that I would want to be in that situation so, just as I would have done in practice, if I think that this is a hearing where this person needs to be represented, they need to be there with somebody who has guaranteed rights of audience. ... then, you know, I will say, 'look, we really need to consider whether you actually have a barrister'. (McKenzie Friend interview)

I don't go into court myself, I use direct access counsel... but I've got a good arrangement with a local chambers. They understand what I'm trying to do for these clients and these people and they also modify their fees to assist with that because these are people that don't have a lot of money. (McKenzie Friend interview)

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<sup>124</sup> In the other two we were not able to speak to the judge.

<sup>125</sup> CMA, above, n 21, para 13, Appendix G5



McKenzie Friends within our sample suggested that they would refer clients to DABs in situations where they felt that the LiP needed specialised assistance at court, or if a LiP client wanted someone to have an automatic right of audience. Several McKenzie Friends said that they have their own list of direct access barristers (and, occasionally, solicitors) that they will recommend.

It is interesting to note that the McKenzie Friends in our sample with relevant qualifications appeared to be more inclined than those without such qualifications to recommend DABs – indeed they made up the majority of those who said they did so. We cannot say for sure why this is but it seems likely that it is attributable to familiarity and comfort with conventional legal processes on the part of those with relevant qualifications and experience.

Our client interviews provided support for McKenzie Friends' reports that they engage DABs; eight interviewees had used a barrister with the recommendation or approval of their McKenzie Friends. It is possible that there is unexploited potential for collaboration between fee-charging McKenzie Friends and DABs (or unbundled solicitors' services, although some McKenzie Friend clients we spoke to were more sceptical of solicitors, given their previous personal experiences). In the right circumstances (which would, of course, involve competent McKenzie Friends) such collaboration could deliver innovative packages of (more) affordable legal services. Our client interviews revealed a certain resourcefulness on the part of more capable LiPs, with some describing how they proactively and creatively drew support from multiple sources. Consistent with this, two client interviewees had decided to use a DAB of their own volition (though both indicated that their McKenzie Friend was happy with their decision):

I actually didn't bring my McKenzie Friend for the final hearing. I decided for the final hearing I hired a barrister... I felt I shouldn't skimp on that final hearing as I was concerned it would be worthwhile and that I would get a better result if I had a barrister who was doing this every day. It was my own decision but [McKenzie Friend] quite understood. (Client interview)

#### **b. The pragmatic approach: the McKenzie Friend as understudy**

In certain circumstances, where the LiP finds participation in court proceedings particularly challenging, the orthodox McKenzie Friend felt they needed to play a more active role, effectively serving as an understudy for the LiP. Our McKenzie Friend interview data highlighted that, rather than asking for rights of audience on a regular basis, many paid McKenzie Friends only did so when they felt it was necessary. The examples of 'necessary' circumstances presented to us included: the client being too emotional to speak; a history of domestic violence making the client feel more vulnerable with the other party present; a client having a disability; English was not the client's first language.

I rarely make an application, or I did one, I think, when there was, many years ago now, when the person I was assisting was autistic and had a - on top of that he had a huge speech impediment and he was an extremely nervous character... in fact I believe the judge encouraged me to make the application. (McKenzie Friend interview)

Interestingly (and consistent with Trinder et al's study of Litigants in Person in Private Family Law Cases)<sup>126</sup> many interviewees reported that the judge was likely to invite them to speak when circumstances required it. This was the case in one of the observed hearings where rights of audience were granted without request. In another observed case, the McKenzie Friend fulfilled the orthodox 'coach' role during the hearing but in interview said that they had been asked to step in for a struggling LiP in other cases:

No, I didn't want rights of audience in his case. I usually don't look for rights of audience. When the fathers are incapable of speaking the judge will usually give it to you by proxy nearly, because the father obviously can't say anything and the judge will look at me anyway. (Observation linked McKenzie Friend interview)

Similar experiences were relayed to us by several others:

Yeah so there has been some occasions where the district judge has, I mean I have never asked for rights of audience because I actually don't think that that's necessarily the right thing to do for a whole host of reasons. But there has been some cases where the district judge has said, you know, I am happy for you to speak, ... But in fact, you know in general terms, I view my role very much of sitting there advising quietly. (McKenzie Friend interview)

The judge really liked him... I think she liked, she found the solicitor very unhelpful and, and she found [McKenzie Friend]'s approach very balanced and helpful so. So it was a sort of a, 'yes I can hear you whispering but actually if you want to say it out in the open you know you're most welcome to do so'. (Client interview)

From this it can be inferred that judges sometimes welcome McKenzie Friends' participation in proceedings, and presumably consider it to be useful. It is submitted that any review of the approach to the exercise of rights of audience by McKenzie Friends ought to take account of this reality. Of particular note is the fact that the current Practice Guidance expressly prohibits this pragmatic approach to conferring rights of audience on McKenzie Friends:

Rights of audience 'should not be extended to lay persons automatically or **without due consideration**. They **should not be granted for mere convenience**.'<sup>127</sup>

Accounts given in interviews suggest that impromptu extension of these rights for the purposes of convenience may be common. One hitherto unconsidered approach to resolving the conundrum would be to remove the option for LiPs to apply spontaneously for rights of audience to be exercised by a lay supporter and to place in its stead the option for judges to invite such applications.

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<sup>126</sup> Above n 4, at p 95-96

<sup>127</sup> Above, n 3, para 20. Emphasis added.

### **c. The Difficult few: rights of audience and McKenzie Friends as frustrated actors.**

A minority of McKenzie Friends we observed and/or interviewed actively seek to assume a greater role in the courtroom by exercising rights of audience. We observed one fee-charging McKenzie Friend addressing the judge from the outset, without formally obtaining rights of audience or being invited to speak. The judge did not object, and before long, invited the McKenzie Friend to continue addressing the court.

Of our seven observed cases, two involved instances where the involvement of a McKenzie Friend had resulted in a serious intrusion on the progress of the proceedings. Both cases involved permission to appeal on a number of points including, in one of them, an earlier refusal to allow the McKenzie Friend rights of audience.

In the first of these cases, it was clear that the McKenzie Friend was motivated in part by a desire to pursue a wider point of principle regarding rights of audience, which went beyond the immediate needs of the LiP client in the proceedings. The judge tried to stress that pursuing an appeal on the rights of audience point might be detrimental to the litigant – it would be costly, cause delay and serve little purpose because the earlier decision on rights of audience would not be binding in respect of future hearings. Permission to appeal on this point was refused.

Some qualifying notes are warranted in connection with this case. The LiP's circumstances were such that it did appear to the researcher that the earlier refusal of rights of audience may have been somewhat harsh.<sup>128</sup> And subsequent to the hearing, the McKenzie Friend said that they would not be pursuing the wider point of principle via a further appeal because they felt that, in light of other developments regarding the LiP's situation, it would not be in the LiP's best interests to do so:

The client has said that I should take it [to the Court of Appeal] but it doesn't seem to be in their best interests so I won't in this instance, which is good for them but not good for other potential McKenzie Friends in future. (Observation linked McKenzie Friend interview)

What this case reveals, is that the uncertainty occasioned by the current discretionary system for granting rights of audience creates the opportunity for proceedings to be sidetracked by this type of appeal.

There appeared to be few redeeming features regarding the conduct of a McKenzie Friend in the second appeal case. In this hearing considerable time was expended discussing numerous allegations of inappropriate behaviour on the part of the McKenzie Friend – much of which concerned their conduct outside of the court environment. There was little evidence during the hearing that this McKenzie Friend accepted or even understood why their behaviour would be considered unacceptable; they said that certain things they had done were what they thought a solicitor would do despite also admitting that very little of their work involved family law cases.<sup>129</sup> During

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<sup>128</sup> It was reminiscent of circumstances in which we were troubled to see rights of audience refused during the fieldwork stage of the *Litigants in Person in Private Family Law Cases* project. See Trinder et al, above n 4, p 96

<sup>129</sup> The judge expressed a very different view of what a solicitor would properly do in such a case.

the hearing, the McKenzie Friend presented as argumentative and unable to restrain themselves from being a lead actor in the proceedings.

We encountered some suggestions that, when rights of audience are refused, the 'frustrated actor' finds ways of stealing the limelight and distracting from the performances of others. In the first of the cases described above, the McKenzie Friend was not permitted to exercise rights of audience for the purposes of the hearing but spoke loudly, constantly telling the LiP very audibly what to say. In freestanding interviews a couple of McKenzie Friends suggested that they too find ways of ensuring that they are heard following refused requests to exercise rights of audience. Whilst this interviewee said they did not normally request rights of audience, they said this of their response to having a request rejected:

I have a bit of a game which I play. You know the courts are generally quite small, especially in chambers, so what would normally happen is I would advise a client but I would advise a client quietly but obviously loud enough that both the court and the other side can hear what I'm saying. So it's all a bit of a nonsense anyway because my quiet advising - I'm not going to whisper. And so they kind of sit there and listen to me and then the client has got to repeat what I've just said. They don't quite repeat it quite right, although they understand the point, and I'll say, "that's not quite it, start again". By which time the judge is saying, "[MF] just, you know, I've heard what you've said and I've taken that on board, thank you"... But I am not someone who says that we should we have a right to do it. (McKenzie Friend interview)

We did not see evidence that the 'frustrated actor' behaviour was widespread. In the only other observed instance of a case in which rights of audience were requested and rejected, the McKenzie Friend simply fulfilled the conventional role, effectively and without objection. It should also be emphasised that only two out of the twenty McKenzie Friends we conducted freestanding interviews with said they frequently request rights of audience. However, there is some evidence that the behaviour of frustrated actors can be disruptive.

#### *A note on cross examination*

We did not observe any McKenzie Friends participating in cross-examination. Furthermore, none of the clients' cases in the freestanding interviews sample had involved cross-examination that was conducted by the McKenzie Friend (or, if they had, the relevant clients were not able to identify that explicitly). Of the McKenzie Friends we interviewed, many viewed cross-examination as outside their comfort zone and were likely to suggest that their LiP client employed a DAB for a hearing in which cross-examination would be needed.

In some instances, we were told that judges, or even barristers for the other party, might request the McKenzie Friend's assistance in cross-examination. For example, this McKenzie Friend described what happened at a fact-finding hearing in which assistance was being provided for a father against whom there were allegations of sexual abuse:

[I]nterestingly, I was refused rights of audience but I was allowed to cross-examine the mother and I finished with the mother and then [another witness] was giving evidence, my client started to cross-examine him and the barrister for

the mother said could [McKenzie Friend] take over and do it. (McKenzie Friend interview)

A very similar scenario was related in another interview by a McKenzie Friend who was also asked by the judge to conduct cross-examination. Both these interviewees thought that, on balance, it had been preferable for the witnesses for them to conduct the cross-examination, though one indicated that their own preference would have been not to do it. The pragmatic approach in this type of case is interesting in light of recent policy discussions related to the cross-examination of those alleging abuse by the alleged perpetrator of that abuse in the family courts.<sup>130</sup>

#### 4.2.2 Moral and practical support

##### a. Helping the litigant to participate effectively

The Trinder et al report on *Litigants in Person in Private Family Law Cases* surmised that, 'If emotional support is the strongest function of a McKenzie Friend the focus should be on friends/families/third sector support workers'.<sup>131</sup> Following this study, we take a different view. We certainly heard examples of fee-charging McKenzie Friends taking steps to support and control their clients that were constructive, but very similar to steps that a friend or family member would take:

I [am] not averse to kicking someone under the table to say shut up. I think I had a circuit judge wink at me once when she heard me say to my client, you know, 'you're gabbling!' (McKenzie Friend interview)

She [client] comes across as being over emotional; coming across as a nut job basically, so I had to keep her calm and you know keep her chilled. (McKenzie Friend interview)

However, in the hearings we observed, there were instances of McKenzie Friends giving explanations and advising on strategy. For example, by explaining what the judge was asking for or prompting the litigant to raise important points in response to the direction of the hearing. By the same token, one of the clients interviewed explained how their McKenzie Friend had assisted them to focus on the salient issues and had given in situ guidance:

Firstly, they advise you in court, what you should and shouldn't be saying; what's worth saying and what's not worth saying. They kind of take away the emotional issues. So whereas I might be aiming somewhere with emotional drive, they'll take that away and then remind you what you should be focusing on, which is really the child, not you ... If I sat there a little bit hazed by the whole experience, he would propose certain questions that would clarify things going forward that I wouldn't have thought of. (Client interview)

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<sup>130</sup> We note that the same approach was recorded in N Corbett and A Summerfield, *Alleged perpetrators of abuse as litigants in person in private family law: the cross-examination of vulnerable and intimidated witnesses* (Ministry of Justice Analytical Series, 2017), p 21-22.

<sup>131</sup> Above, n 4, p 112.

An inexperienced friend or family member would likely be less able to provide this sort of support, which depends in part on an understanding of the rudiments of family court proceedings. Of course, the ability of some experienced McKenzie Friends to give practically useful advice during a hearing supplements the considerable work that most of those we spoke to said they do prior to arrival at the court to help prepare the litigant. As well as being important to LiPs, McKenzie Friend assistance with preparing position statements, bundles and questions for cross-examination, as described in chapter three, is likely to improve a LiP's ability to participate effectively in proceedings at court.

Finally, a couple of McKenzie Friends commented on the benefits they derived from familiarity with particular courts. For example, knowing when and how to present position statements (i.e. by post or in hard copy on the day) to comply with the preferences and protocols in place:

Again, there's inconsistency within the courts because, it's been a longstanding practice that one could turn up to court with a short position statement, and ask the usher to take it into the judge on the day. Now, quite a number of courts are refusing to do that, refusing to take them. Now there's an expectation that you send them in, in advance. (McKenzie Friend interview)

It's one particular court in [area], I won't say where, I just hold my head in my hands because I know what's going to happen when I get there. I am going to assist the clients, we're going to prepare a position statement, we're not going to see any ushers to hand the position statement in before we get there. (McKenzie Friend interview)

## **b. Drafting orders**

It has previously been found that the inability of LiPs to draft orders (a task ordinarily undertaken by legal representatives) poses a difficulty for the courts, with judges increasingly having to do it themselves.<sup>132</sup> Although many of the McKenzie Friends we interviewed talked of drafting consent orders in the course of their work outside of, perhaps in preparation for, court, there were far fewer examples of them drafting orders at the conclusion of a hearing. Unsurprisingly, it was suggested that, where the other party has legal representation, that representative is usually expected to draft the order. Thus, in one of our observed cases, a judge was unwilling to permit the McKenzie Friend supporting the applicant to draft an order when the solicitor representing the respondent indicated that all parties were content for him to do so. The judge insisted on the solicitor drafting the order, expressing the view that the McKenzie Friend should not be drafting it because they were not a qualified person and doing so would amount to conducting litigation.

We did, however, hear accounts of judges being slightly more willing to countenance McKenzie Friend support with drafting orders:

if the other side has a barrister or solicitor it's expected that they would do it. ... but occasionally if it's just me - the other side is a litigant in person - then the

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<sup>132</sup> Trinder et al, above n 4, p 71



judge will say or sometimes the legal adviser might say, because they've seen my CV, they might say, "[MF], could you draft it?" So I will draft it. And then it goes back into court and the judge will say "Yes, that's fine" or will change it to what he or she thinks it should be. But generally judges would normally draft it. (McKenzie Friend interview)

The clerk just said well X is a respected McKenzie Friend, would you be happy to take this couple into one of the side rooms and thrash out some sort of agreement between them that you could bring back to the court? ... Both litigants in person and I was asked by the court to sit in the middle of them, produce effectively an order by consent which we did, it took two hours... I helped the clerk to write the order out. (McKenzie Friend interview)

That some judges will permit a McKenzie Friend to assist in drafting an order, while we observed one suggesting that it constituted the conduct of litigation is a further indication that clarification on the scope of reserved activities is needed. That said, our impression was that McKenzie Friends participate in the drafting of orders less frequently than they undertake other activities at court. Performed well (and we do not have evidence to inform a judgement of whether McKenzie Friends do generally perform well here), this is a task that would undoubtedly save judges a great deal of time in some cases. As such, the reluctance of judges to delegate this task to McKenzie Friends might suggest that it is perceived to be at the outskirts of the parameters of their usefulness.

### **c. Negotiation and settlement activity**

Trinder et al's research highlighted that negotiation between the parties outside of the courtroom is a fundamental element of the 'standard pathway' for family cases in which both parties are represented, the aim being to reach agreement or to narrow the issues in dispute prior to the court hearing. It was found that LiPs without representation did not use waiting time constructively and needed 'guidance, focus and support to commence and sustain any negotiation at court.'<sup>133</sup> McKenzie Friend contribution to negotiation and settlement activity is something that has not previously been acknowledged. Our freestanding interviews with McKenzie Friends revealed that all were aware of the expectation that negotiation and settlement should be a standard feature of most court cases, and the vast majority said that they proactively encouraged or even facilitated it:

I think negotiation should always be the very first port of call because even if you can't come to an agreement on all the issues then you can come to, you can narrow the issues and I think that's really important. (McKenzie Friend interview)

I might, for example, go to court with a client on a kind of, you know, initial Children Act directions appointment and a lot of the times we can get it resolved then, which is brilliant, and just go in to see the district judge very briefly with an agreement which is always fun. (McKenzie Friend interview)

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<sup>133</sup> Above n 4, p 48.



I can be party to the out of court discussions so if the other party has a solicitor or barrister, they will more often than not seek to speak to me rather than the client. And so sometimes I'm a kind of go-between back and forth between either the barrister and the client trying to map out an out of court arrangement before we go in front of the magistrates or judge. That works, on some occasions that works really successfully (McKenzie Friend interview)

Clients corroborated McKenzie Friend accounts of facilitating settlement at court:

When we got to court he did speak with the other side's solicitor and we didn't actually have a contested hearing or anything like that, she pretty much agreed to the consent order that we had kind of put together (Client interview)

He then went and spoke to the other side's solicitors then came back and said, you know, they're not going to negotiate. And then in the hearing itself I think [ex partner]'s solicitors didn't do themselves any favours and the judge I think was quite quickly sympathetic and so did send us out on a couple of occasions to actually, you know, with an instruction to her side to negotiate properly and I left that to [McKenzie Friend]. (Client interview – describing negotiation of a settlement order)

One McKenzie Friend similarly recounted a case where the judge gave a direct instruction to the McKenzie Friend and the other party's barrister to go outside and negotiate:

So he [the judge] said what I want is your McKenzie Friend, Mr Thingy, well that was me, to go out with that, your barrister, Mrs Da-Da-Da, in private and come to an arrangement. Now that is quite rare, he didn't know me from Adam apart from my CV. So between me and the barrister, we worked out an agreement. Then I put that to my client ... so there is a lot of involvement sort of in the wings if you like, out of the courtroom. (McKenzie Friend interview)

Several clients noted that they did not feel they would have been willing or capable of participating in negotiation without their McKenzie Friends:

If I just went to court on my own, because I couldn't afford a solicitor, I've got to try and communicate with the other parties outside the courtroom, and that's not really for me. The McKenzie Friend went and spoke to her barrister, and that helps take something into court with a better stance. You've got to have someone there, and I think a good McKenzie will help build bridges between the parties. (Client interview)

So when I went for the emergency hearing, because I was on my own, my wife's solicitor approached me and he wanted to do a negotiation in the waiting-room, which was completely new to me – I never knew any of this side of things happened. ... But when [MF] was there then for the hearing, I saw how useful it was, because the two of them then acted as go-betweens. I wouldn't necessarily ever have to talk directly to the solicitor, so he could be the messenger. (Client interview)

Observations at the courts in this study demonstrated a variety of approaches towards settlement activity. The McKenzie Friend in one case spent a lot of time talking to their client in the waiting room but did not attempt to engage in any discussions with the other party (who was unrepresented). Another case provided a good example of a McKenzie Friend contributing positively to the settlement negotiation process. This McKenzie Friend fulfilled the traditional supportive role in court but was proactive outside the courtroom, supporting and assisting the LiP in negotiations with the other party. Following the hearing, their assistance in this regard was commented on very positively in interviews with both the legal adviser and the solicitor for the other party, with the latter commenting that the contribution was very similar to what would be expected of a solicitor.

On the other hand, one case revealed a McKenzie Friend ostensibly performing very positively by brokering an agreement at great length outside of the court room. However, the judge would not accept the agreed draft order that was submitted, considering it an agreement that it was wholly unrealistic to expect an endorsement of at that stage in the proceedings. This case was also unusual in that the respondent's solicitor agreed, in the course of the negotiations, to an arrangement that involved a complete alteration of the existing contact arrangements. As such, full responsibility for the ultimate futility of the protracted negotiation cannot be laid at the McKenzie Friend's door.

#### **d. Negotiation as a reserved activity?**

In a further illustration of the problems caused by the ambiguous ambit of 'conducting litigation', one McKenzie Friend reported reservations about whether they were permitted to support negotiation outside of the courtroom:

I don't think you should be involved in negotiating on your client's behalf, as in verbally negotiating on your client's behalf. You should still be, negotiation is obviously something that goes in letters when you're bouncing letters back and forth... but you should not be negotiating with the other side on your client's behalf because, again, I feel that that's conducting reserved activity, you're not the client and nor are you their solicitor. (McKenzie Friend interview)

Although this view was expressed by an experienced non-practising solicitor, it appears to be mistaken. Negotiation is in the Bar Standards Board's list of tasks that public access barristers are permitted to undertake in the context of guidance designed to assist barristers in avoiding inadvertent trespass into the field of conducting litigation.<sup>134</sup> However, the view is perhaps a manifestation of an understandably cautious interpretation of paragraph 4 of the current Practice Guidance, which states that 'MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents' (or, alternatively, of paragraph 3's stipulation that McKenzie Friends may '*quietly give advice* on any

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<sup>134</sup> Bar Standards Board, The public access scheme guidance for barristers (para 9). Available at: [https://www.barstandardsboard.org.uk/media/1725710/the\\_public\\_access\\_scheme\\_guidance\\_for\\_barristers\\_january\\_2016.pdf](https://www.barstandardsboard.org.uk/media/1725710/the_public_access_scheme_guidance_for_barristers_january_2016.pdf)

Also, see para 12 of the guidance for the list of tasks that the BSB considers falls within the definition of conducting litigation.

aspect of the conduct of the case’).<sup>135</sup> Two other McKenzie Friends reported experience of a lawyer asserting that the President’s Guidance precluded them from negotiating on behalf of the client:

I had the debate with the barristers, one vociferous barrister who, during negotiations in one of the side rooms, said but you’re only a McKenzie Friend, you’re only allowed to quietly advise. ... I said sorry, if my client wants me to speak 100% on his behalf, I’ll sit here and do it. So people don’t understand there is a fine definition. (McKenzie Friend interview)

[I]n the President’s guidance the McKenzie Friend doesn’t talk to the barrister without their client there, the majority of barristers would quite happily talk to me without my client there because the client is just going to interrupt and get all emotional and not deal with the right things so the majority will talk to me quite happily. I had one who came into the waiting room, the consulting room we were in, and I said something and she said “you’re not allowed to talk”. So I had to say to my client, “X can you just tell her we’re going to do this”, and then he would repeat it and she would answer him and it was just ridiculous. (McKenzie Friend interview)

These three accounts combined suggest that some clarification of the guidance is merited.

Although we are not in a position to present conclusions on the quality of the contributions that McKenzie Friends make to negotiation and settlement, there is at least the potential for their efforts to assist LiPs in accepting that it is a crucial part of the court process and attempting to engage with it.

### 4.3 Miscellaneous observations

Much that we heard and observed of the work done by fee-charging McKenzie Friends at court was positive. But there is a caveat. We were only able to observe seven hearings and within that small sample we witnessed a relatively high number of instances of McKenzie Friends making questionable decisions. Most concerning was the indication that some McKenzie Friends might mislead the court about their true status, and the case in which those decisions had effectively become the focus of the proceedings. But there were a number of more minor issues.

Most of the minor issues have already been referred to. So, in chapter two, we highlighted the observed case in which a conflict of interest issue arose as a result of the McKenzie Friend allegedly having had dealings with the other party earlier in the process, although we also noted that it was appropriately dealt with.<sup>136</sup> Meanwhile, in chapter three we noted one apparent instance of a McKenzie Friend selecting the wrong court application form for a LiP to use. In this chapter, we related an example of a McKenzie Friend brokering a negotiated agreement (along with a lawyer) that the judge perceived as entirely unrealistic.

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<sup>135</sup> Emphasis added.

<sup>136</sup> We were told that the McKenzie Friend had withdrawn from the case and referred the LiP client to another McKenzie Friend to assist at the next hearing.

A couple of minor issues remain to be mentioned. In one observed case, the fee-charging McKenzie Friend was committed to attending more than one hearing, at different courts, on the same day. This appeared to be a high-risk strategy as, had the first hearing overrun, there would have been a strong chance of failing to make the second hearing. In the same vein, the McKenzie Friend in another case was committed to travel arrangements that depended on a full-day hearing concluding on time. We observed one McKenzie Friend arriving at court ten minutes later than the time the hearing was listed for, though the case had not been called so this did not manifest into a problem. Finally, in one of the hearings the observer noted that the McKenzie Friend did not seem to have very good knowledge of the paperwork associated with the case. Given that this McKenzie Friend was charging a flat fee of several hundred pounds for support at court including associated preparation, this was surprising. The LiP commented on this point in a post-observation interview.

Of course, the fact that the number of observations is small means that one should be cautious about extrapolating generalizable insights from it. Any temptation to take the incidents outlined above as support for the recently proposed prohibition on fee-recovery by McKenzie Friends appearing in court should be tempered by the fact that the problems we observed were mostly minor and could only be described as a major intrusion in two cases. Furthermore, as far as we could ascertain, paid McKenzie Friends participated in only 14 of 366 listed hearings involving litigants in person.

## 4.4 Conclusions

Overall, the findings set out in this chapter indicate that a majority of the fee-charging McKenzie Friends we encountered provide support at court that can facilitate the smooth running of proceedings in ways that are probably useful to both the litigant and the court. This extends to the exercise of rights of audience in certain instances. However, there does also seem to be the potential for the exercise of the judge's discretion on this point to serve as a flashpoint for difficulties in a minority of cases. Given that there appears to be widespread acceptance that rights of audience are not integral to the McKenzie Friend's role, we think a clearer and better approach to the granting of rights of audience on a case-by-case basis would be to state that rights of audience may only be exercised by McKenzie Friends at the invitation of the judge, rather than on the application of the litigant. To the best of our knowledge such a suggestion has not previously been considered. As it would amount to a substantive reform, it would presumably require changes to the codified Civil and Family Procedure Rules, something that has been mooted in the Lord Chief Justice's consultation on the court response to McKenzie Friends.<sup>137</sup> We also saw evidence in this chapter of confusion surrounding which activities fall within the bounds of conducting litigation, and therefore outside the bounds of what McKenzie Friends should be able to do. This reinforces the finding in chapter three that the definition is in need of refinement.

What, in conclusion, should be made of the problems we encountered? We suggest three points for consideration. First, any assumption that the minor problems we encountered would not have been encountered in a study of lawyers should not be taken as a given. Numerous studies have found fairly widespread examples of poor

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<sup>137</sup> Above, n 18.

quality work being done by lawyers, especially where they are not specialists in a particular area (though the regulation of lawyers does, of course, provide litigants with remedies in the event of poor practice).<sup>138</sup>

It is probably a fair assumption that flaws in the work of lawyers would not be found as frequently as they were in our observed sample of McKenzie Friend cases. Even if that were the case this brings us to our second point. As noted in the introduction to this report, the appropriate question is not whether the litigants we observed would have been better off with a lawyer, but whether they would have been worse off without their fee-charging McKenzie Friends. We have suggested above that the problems we observed were not sufficient to outweigh the advantages that the McKenzie Friend brought for the LiP and/or the court in four of the observed cases. In a further case, we judged the impact of the McKenzie Friend to be neutral and in one of the cases in which problems arose as a result of a protest against refusal to let the McKenzie Friend exercise rights of audience, the McKenzie Friend appeared to have provided very useful assistance out of court.

This, of course, is a judgement formed on the basis of limited observations. Firmer conclusions on whether the advantages of fee-charging McKenzie Friends outweigh the disadvantages at court could only be drawn following more extensive research. Such research would be difficult to design given the obstacles that the existing system poses to reliable identification of cases in which McKenzie Friends are assisting. As such we think the Competition and Marketing Authority's recent recommendation that HMCTS should look to adapt data sources in order better to collect information related to McKenzie Friends is worthy of serious consideration.<sup>139</sup>

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<sup>138</sup> This includes a recent study revealing great variability in the quality of advocacy provided in youth proceedings: A Wigzell, A Kirby and J Jacobson, The youth proceedings advocacy review: final report (Bar Standards Board, November 2015). See also R Moorhead, A Paterson and A Sherr, 'Contesting professionalism: Legal aid and non-lawyers in England and Wales' [2003] 37 Law and Society Review 765, R Moorhead and M Sefton, Litigants in Person: Unrepresented Litigants in First Instance Proceedings (Department for Constitutional Affairs 2005) and IFF Research (2011), Understanding the Consumer Experience of Will-Writing Services (Legal Services Board, Legal Services Consumer Panel, Office of Fair Trading and Solicitors Regulation Authority). Available at <[http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/pdf/lsb\\_will\\_writing\\_report\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf)>.

<sup>139</sup> Above n 20, p. 272.

## Key findings

- There are a range of practices and inconsistencies between courts in the identification and registration of attendance of fee-charging McKenzie Friends.
- Cases involving paid McKenzie Friends in private family law proceedings appear to constitute a relatively small proportion of the total number of hearings involving LiPs.
- Direct observation of the work of McKenzie Friends in seven observed cases highlighted more problems than self-reporting by the McKenzie Friends we interviewed but most of these were minor.
- On balance, we judged the contribution of the fee-charging McKenzie Friend to have been positive in four observed cases, positive to neutral in one case, and negative in two observed cases.
- The evidence from Chapter three that most McKenzie Friends said they are inclined to support settlement out-of-court was reinforced by court observation and interview data indicating that McKenzie Friends support the negotiation process at court too.
- A majority of McKenzie Friends we encountered restrain themselves to a 'coach' type role in the courtroom and prefer not to seek rights of audience in the absence of exceptional circumstances. We saw some evidence of 'frustrated actor' McKenzie Friends whose active efforts to exercise rights of audience caused difficulties and heard evidence that judges sometimes invite McKenzie Friends to address the court when they perceive that this might be useful.
- It is reportedly not uncommon for paid McKenzie Friends to refer LiP clients to other family justice professionals, particularly direct access barristers, for specialist assistance.

## 5. Conclusions

### 5.1 The good, the bad, and the hitherto unknown

At the beginning of this report we noted divisions of opinion between commentators who have been relatively sanguine about the existence of fee-charging McKenzie Friends and those who, by contrast, have expressed anxiety about them.<sup>140</sup> Our research set out to deepen previous knowledge and understanding of the work done by fee-charging McKenzie Friends, with particular emphasis on the support they provide in the courtroom and the experiences of the litigants who use them. Our findings revealed a somewhat mixed picture.

Much of what we heard and observed suggested that fee-charging McKenzie Friends can provide useful support. For example, our interviews with McKenzie Friends suggested that the way many McKenzie Friends calculate their fees means that they appear to offer litigants' access to support with legal disputes that is considerably cheaper than the services of a solicitor would be; client accounts of money spent on solicitors and McKenzie Friends corroborated this. Even if the services purchased are not identical to those provided by solicitors (excluding, for the most part, tasks associated with the conduct of litigation and oral representation at court as well as the framework of protection provided by regulation), this is important given the legal advice vacuum created for many litigants by the withdrawal of legal aid through LASPO. Moreover, responses to our vignette indicated that many McKenzie Friends in our interview sample had adequate levels of basic procedural awareness, notwithstanding that most had no formal legal qualification. The research findings also suggest that a large proportion of McKenzie Friends are conscious of the need to restrict the work they do in certain respects, in acknowledgement of the existence of regulatory boundaries and of the need to avoid exceeding the limits of their knowledge and skills. As such, we were told that a decent proportion of McKenzie Friends make referrals to barristers and solicitors for more challenging work. Our interviews with McKenzie Friends and clients, and our court observations suggested that rights of audience are not routinely sought. However, we also heard reports, echoing the findings of previous research, that judges will invite McKenzie Friends to address the court when they perceive that it is useful for them to do so. This suggests that there are occasions when judges value the input of fee-charging McKenzie Friends.

Another positive finding related to the reported existence of a strong settlement orientation among those we interviewed.<sup>141</sup> We also witnessed McKenzie Friends contributing to the negotiation process in the observation stage of the research, and

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<sup>140</sup> See chapter 1, pp 5-9.

<sup>141</sup> We note here that it is not self-evident that settlement is always a good thing and use the term 'positive' to connote the fact that McKenzie Friends are very much in line with the prevailing ethos in family justice here. There is always the possibility of a litigant settling for an arrangement that falls far short of their legal entitlements and it seems likely that 'under settling' is now more common in light of the emphasis on mediation as a primary form of dispute resolution and the increasing inaccessibility of funded legal advice. For more on settlement culture in the family justice system see Smith, L and Trinder, L, *'Mind the gap: parent education programmes and the family justice system'* (2012) *Child and Family Law Quarterly* 428; and Barlow AE, Hunter R, Smithson J, Ewing J (2017). *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (London: Palgrave Macmillan).



accounts of similar work being done by the McKenzie Friends that our client sample had used.

In terms of McKenzie Friends themselves, we discovered that a minority are well-qualified through education and/or professional background to provide legal support, and there is an apparently widespread interest in professional development, as evidenced by the popularity of bespoke McKenzie Friend training that is provided by some within their ranks. The clients of McKenzie Friends we interviewed were overwhelmingly positive about their experiences too. That said, we think this positivity is tempered by two factors: first, the fact that our sample was probably skewed towards those with a pro McKenzie Friend leaning; and secondly, the obstacles to consumers' abilities to assess reliably the quality of advice given in such a highly specialised and open-ended area as law.<sup>142</sup>

Not all the data from this study paints fee-charging McKenzie Friends in a positive light. As reported to us, there were varying levels of rigour in the extent to which the cohort we interviewed took steps to establish good business practices, such as transparent complaints procedures, safe working practices, and reliable systems for case management and confidential handling of information. Our judgement is that some of those we interviewed were more ready than they ought to have been to give advice on aspects of the law that are difficult to interpret. Meanwhile, our small sample of court observations indicated a high incidence of minor errors in procedural knowledge or judgement. More concerning, the progression of two out of the seven cases observed had been significantly impaired by issues stemming from the involvement of a fee-charging McKenzie Friend.

To all this we must add two reasons for suspecting that our study might have captured more of the positive than the negative details about McKenzie Friends. First, the design of our study was such that it is likely we surveyed the more willing to engage branch of the fee-charging McKenzie Friend population. The list of potential interviewees that we originally generated excluded anyone who did not have an online presence. A consequence of this is that recent entrants to this area of work, with low levels of experience, were largely uncaptured.<sup>143</sup> We heard, for example, from one client interviewee who had begun providing services for others as a fee-charging McKenzie Friend as a result of involvement with complex and protracted proceedings; this client expressed intense hostility towards the justice system and legal professionals and did not convey sound understanding of very basic tenets of family law and procedure. The McKenzie Friend at the heart of the most problematic case we observed did not normally work in the area of family law. This might provide part explanation for the individual's poor awareness of what it was and was not appropriate to do in connection with the proceedings, but there is nothing to prevent manifestly unqualified individuals from experimenting with new areas of legal support.

Secondly, we cannot ignore problems pertaining to fee-charging McKenzie Friends that are clearly present but fell outside the purview of the study, such as those outlined

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<sup>142</sup> See text to n 96 on p 54, above.

<sup>143</sup> As noted in chapter one, we did interview one newly established McKenzie Friend whose details were passed to us by a more experienced interviewee.

earlier in the discussion of ‘rogue’ McKenzie Friends in chapter two.<sup>144</sup> Whilst it is possible such incidents are isolated, and regulated lawyers are sometimes found to have committed equally egregious acts, we should remember that the number of incidents involving McKenzie Friends has arisen from quite a small population. In addition, a recent small scale review of the websites and social media pages of fee-charging McKenzie Friends has identified problems in how some McKenzie Friends advertise their services online and noted a contrast in the tone of posts from McKenzie Friends on social media pages, such as Facebook (including statements attacking mothers and the family courts) compared with the more measured and child-focused statements on their own websites.<sup>145</sup> An analysis of the webpages of McKenzie Friends did not form part of this study but in searching for an initial list of potential interviewees, the researchers did note examples of information being presented that was inflammatory and potentially misleading. There is perhaps more evidence of ‘the crusader’, or agenda-driven McKenzie Friend, to be found online than there is in our sample. There is certainly a case to be made for a thorough analysis of the online advertising of McKenzie Friends, not least with a view to checking compliance with consumer protection laws.

In some ways, the most interesting findings we have outlined in this report are those indicating that the size and shape of the ‘problem’ presented by fee-charging McKenzie Friends is rather different to that assumed in previous discussion and commentary. To begin with, the data from our court observations suggests that fee-charging McKenzie Friends remain a relatively rare occurrence, whether or not they are more in evidence than they were some years ago. It is worth reiterating that this finding is reflected in the recent work of the CMA and LSB on unregulated legal services,<sup>146</sup> and that the work of those bodies demonstrates that other unregulated legal services, such as those provided online, are being utilised on a scale that is probably far greater than the work of fee-charging McKenzie Friends.<sup>147</sup> For several reasons it is rather more likely that the market for online legal services will expand further than the fee-charging McKenzie Friends market will. In light of that, it is striking that less attention has been devoted by the legal professions to the question of how that emerging and unregulated legal services sector should be scrutinised or regulated than to the issue of fee-charging McKenzie Friends.

This is not to suggest that the subject in hand is not worthy of consideration at all. Insofar as it is, perhaps the most interesting findings from this project are those suggesting that a substantial amount of the work of fee-charging McKenzie Friends, at least among those we interviewed, is conducted away from the courts. In this way McKenzie Friends raise as many, if not more, issues about the regulation of litigation, and unregulated provision of legal advice, as they do about the regulation of advocacy.

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<sup>144</sup> Chapter 2, pp 21-22.

<sup>145</sup> See A Melville (2017). Above, n 52.

<sup>146</sup> CMA (2016), above n 21, and LSB (2016), above n 20. The relevant figures from these sources are cited in footnote 23 on p 8 of this report.

<sup>147</sup> The Legal Services Board found that some 10-13% of legal services for divorce are being sourced from unregulated, for-profit online providers. LSB (2016), above n 20, p 10.

## 5.2 Some thoughts on the regulatory ramifications of the research

### 5.2.1 The case for excluding fee-charging McKenzie Friends from courts

It is appropriate to return at this point to the recent proposals to restrict the basis on which McKenzie Friends can charge a fee for support provided at court. It will be recalled that the Lord Chief Justice's consultation sought views on a proposal to:

... prohibit recovery of expenses and fees incurred by McKenzie Friends... through providing that the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration.<sup>148</sup>

The CMA recently presented this view:

Unauthorised providers who operate as 'paid' McKenzie Friends may provide an important service to the vulnerable and those who cannot afford to instruct a solicitor or barrister. As not having advocacy or litigation support during legal proceedings is potentially very risky, any reforms aimed at reducing incentives for unauthorised providers to enter the market and provide these services should also take into account unmet demand considerations. Therefore, we believe that the proportionality of a blanket ban on fee-charging McKenzie Friends needs to be assessed carefully given its likely impact on consumer choice.<sup>149</sup>

A blanket ban is not, of course, what has been proposed; the proposals put forward in the recent consultation would not preclude fee-charging McKenzie Friends from providing advice and support services in support of litigation outside of court. In fact, it is not clear whether they would entirely preclude the charging of fees for support inside the courtroom, as it appears that the draft Civil Procedure Rules appended to the consultation document would only result in permission to exercise rights of audience or to conduct litigation being withheld on the basis that a fee was being charged. They would not apparently prohibit the provision of more general court support in the way that is proposed in the main text of the consultation. A decision to act on the broader proposal and remove the right for McKenzie Friends to provide any court support on a fee-charging basis could indirectly reduce the number of fee-charging McKenzie Friends in operation, if the removal of one of their income streams made their work less sustainable overall. Either way, there is sufficient cause for concern that the withdrawal of paid McKenzie Friend support in court could be to the detriment of some litigants. Other research that considers the advantages of support *in court* bears out the CMA's view that litigating without it can be risky. As Moorhead notes, numerous studies have shown that representation improves the outcomes of litigants.<sup>150</sup> He adds, 'such quality

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<sup>148</sup> Lord Chief Justice of England and Wales, Reforming the courts' approach to McKenzie Friends: a consultation (2016), para 4.21 and associated discussion at pp 19-21.

<sup>149</sup> CMA (2016). Above, n 20, p 175.

<sup>150</sup> R Moorhead, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67 Current Legal Problems 447.

representation is not confined to clients represented by qualified lawyers; specialist non-lawyer advisers can perform at higher or similar levels of quality where they are permitted to practise'.<sup>151</sup> Moorhead et al also emphasise that the quality of non-qualified advisers may be context specific;<sup>152</sup> they were looking at specialised advisers in non-profit organisations. Greiner et al's work emphasises the importance of context, specialization and the ways in which courts work when comparing unbundled legal assistance: they think some approaches to judging put a premium on the need for specialised, adversarial lawyers.<sup>153</sup> This is a reminder that courts might adapt to deal more justly with litigants in person and McKenzie Friends.

This study identifies risks that could be explored further, but in our view the case for excluding fee-charging McKenzie Friends from the courts has not yet been made out. For many LiPs, the choice is between being unsupported or using a McKenzie Friend; free support is limited and paying for lawyers is beyond their means.<sup>154</sup> Furthermore, the fee-charging McKenzie Friends in our sample, on the whole, seemed sufficiently competent to improve on LiPs' abilities to manage their cases. We have also found that fee-charging McKenzie Friends are highly valued by at least some clients, and that they offer something different in nature from traditional services of solicitors and barristers (something that is, in part, almost tangential to the process itself). Granted, fee-charging McKenzie Friends occasionally flounder but, alone, LiPs do all that we observed in that respect and more.<sup>155</sup>

Our identification of some risks and problems suggests that questions about the quality of the work done by fee-charging McKenzie Friends remain. A more detailed evaluation of their services than this study afforded would involve capturing data from: larger numbers of McKenzie Friends, as well as opponents and litigants involved in cases they work on; more direct observation of their work inside, outside and away from court; as well as consideration of how they market their services. Such a study should, in our view, be conducted but any efforts on this front will be limited unless and until better mechanisms for identifying McKenzie Friend involvement in cases are established. Only a study of greater scale and scope is likely to change the calculus of risk sufficient to justify measures that would substantially curtail the provision of McKenzie Friend services, in or out of court.

This does not mean that there is no case at all for reflecting on whether the work for fee-charging McKenzie Friends should be the subject of some form of regulatory scrutiny.<sup>156</sup> Our view is quite the opposite – there is enough that is concerning in

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<sup>151</sup> Ibid, p 448.

<sup>152</sup> R Moorhead, A Sherr and A Paterson (2003). Above, n 24.

<sup>153</sup> D James Greiner and Cassandra Wolos Pattanayak, 'Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?' [2012] Yale Law Journal 2118; D James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy, 'The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future' (2012) 126 Harv. L. Rev. 901.

<sup>154</sup> LSCP Report (2014). Above, n 5, para 1.7, page 3.

<sup>155</sup> See Trinder et al (2014). Above, n 4.

<sup>156</sup> As Zuckerman notes, it is folly to suggest that the only options are acceptance of the current situation or an outright ban. A range of mid-way interventions exist between those two extremes. A Zuckerman, 'The court's approach to McKenzie friends - a consultation, February 2016 - no improvement in assistance to unrepresented litigants' [2016] 35(4) Civil Justice Quarterly 268-278.

relation to fee-charging McKenzie Friends to merit efforts to tackle the worst of the sector. Currently, almost all the risk that is entailed in using a fee-charging McKenzie Friend falls on the client, as opposed to the service provider. Some of the risk is borne by the justice system too. This cannot be right. It is no indictment on the core of seemingly helpful McKenzie Friends that there is a peripheral group who are at best ill-equipped to do what they do and at worst profoundly damaging to their clients and/or the justice system. Rather, it is an indictment on the system that enables them to do it. Therein lies the case for intervention of some sort.

### 5.2.2 Mind the regulatory gap

We would add to this the case for rationalizing the current approach to regulating legal services that this research has highlighted – a case that stands irrespective of whether one regards McKenzie Friends as helping unrepresented LiPs to do better than they would have done alone. The professions' anxieties about McKenzie Friends are no doubt partly motivated by bad experiences - direct or vicarious - with some McKenzie Friends. But they are also prompted by the way in which McKenzie Friends work around the reservation of litigation and advocacy. This has the potential to delegitimise legal services regulation and pose risks to clients and the work of the courts. To the extent that this has been recognised, the policy debate thus far has concentrated on the tip of the iceberg: what happens in court. As we have shown, this is important. But what lies beneath the surface in terms of the work McKenzie Friends do outside of court is almost certainly more important; it is quantitatively more significant (more cases involve assistance from than appearances in court by paid McKenzie Friends) and it may be more substantively significant (as this preparatory work shapes outcomes in both hearings and out-of-court settlements).

The out-of-court support provided by McKenzie Friends - often including advice on settlement, process and strategy - effectively means that the risks that regulation of litigation is designed to manage are posed whether or not one regards McKenzie Friends as litigating or advocating for their clients. Consequently, while it is common to think of McKenzie Friends as posing a challenge to rights of advocacy, as a result of this research we think the biggest potential challenge is to the regulation of litigation. What it means to conduct litigation is not clear. We have seen that, in practice, fee-charging McKenzie Friends are restricted from doing very little by the prohibition on the conduct of litigation by unauthorised and unregulated individuals. For all that it seems important that 'the formal steps associated with litigation' should be taken only by those suitably qualified, the formal steps themselves are administrative (signing documents, lodging documents with the courts etc); it is the prior decisions about when it is appropriate to initiate those administrative steps and what should go in those documents that really require the exercise of skill and expertise. But the regulatory gap created by not including legal advice within the scope of reserved activities means that a LiP can be motivated to make those decisions on the advice of a fee-charging McKenzie Friend.

We suggest that there is little logic in this position and that the conduct of litigation ought to be more rationally and clearly defined, perhaps even extended to encompass provision of legal advice. Of course, whether considering this or alternative responses to

the work of fee-charging McKenzie Friends in future,<sup>157</sup> it will be important to be wary of any measure that would effectively extend the monopoly on the provision of legal services in an environment in which unmet legal need is extensive.

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<sup>157</sup> Possible alternatives include: suggestions we made in chapter four about changes to relevant court rules; the CMA's proposal that consumer protection be increased via the extension of the remit of the Legal Ombudsmen (CMA, 2016, above, n 20, p 142); or introducing a specific regulatory regime for McKenzie Friends, akin to that introduced for immigration and asylum advice through the Immigration and Asylum Act 1999.

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## Glossary

**Bundle:** a collection of documents relevant to a court hearing and which are necessary for the court to read or will be referred to during the hearing. Relevant documents may include: applications and court orders, statements, affidavits and experts' and other reports.

**Cafcass:** Children and Family Court Advisory and Support Service. Cafcass is a non-departmental public body set up to safeguard and promote the welfare of children involved in family court proceedings. Their work includes providing information, advice and support for children and their families involved in proceedings and advising the courts on what they consider to be in the best interests of individual children.

**Chartered Institute of Legal Executives (CILEx):** the professional body for Chartered Legal Executives.

**Child arrangements:** new terminology introduced to encompass both residence and contact issues for children.

**Civil Justice Council:** advisory public body with responsibility for overseeing and co-ordinating the modernisation of the civil justice system.

**Competition and Markets Authority (CMA):** independent body with responsibility for promoting competition in markets for the benefit of consumers.

**Consent order:** a court order formalising the parties' agreement about the subject of proceedings. Commonly used in respect of financial claims that arise on divorce or civil partnership dissolution. Consent orders can also confirm agreements that have been made between parties in children cases.

**Cross-examination:** at a hearing, questioning of a party or of a witness called on their behalf to give evidence, by the other party or the other party's advocate.

**Direct access barrister:** the Bar Council's direct access scheme allows a member of the public to engage a barrister directly (subject to the barrister meeting certain criteria) without having to go through a solicitor.

**Disclosure:** in financial remedy proceedings, the parties are under a duty to give full and frank disclosure of all material facts, documents and other information relevant to the issues. Similar obligations may apply in other proceedings.

**Fact finding hearing:** a court hearing set up for the court to decide on issues of fact or allegations which are in dispute. Most relevant to allegations of domestic violence or abuse in children cases.

**FHDRA - First Hearing Dispute Resolution Appointment:** the initial court hearing after a child arrangements application has been made to the court. The FHDRA provides the parties with an opportunity to be helped to an understanding of the issues which divide them and, if possible, to reach agreement. If agreement can be reached the court

may make an order disposing of the case; if not, the court will give directions for future conduct of the case.

**Financial remedy proceedings:** may be brought to resolve financial and property issues upon divorce or civil partnership dissolution.

**Final hearing:** the trial at which the court will decide the outcome in a case that has not settled. The parties may be expected to give oral evidence and be cross-examined.

**Information Commissioner's Office (ICO):** independent public body, the role of which is to uphold information rights; this remit includes oversight of organisations that processes personal information.

**Institute of Paralegals:** representative/self-regulatory body for paralegals (somebody who does legal work but does not have a professional qualification such as solicitor, barrister, or chartered legal executive).

**LASPO – Legal Aid Sentencing and Punishment of Offenders Act 2012:** legislation reforming the scope of legal aid (public funding for legal services).

**Litigant in person (LiP):** a litigant acting without legal representation in conducting hearings in court and, more broadly, acting without legal representation in court proceedings generally.

**Legal Services Board (LSB):** independent body responsible for oversight of approved regulators of legal professions.

**Legal Services Consumer Panel (LSCP):** independent arm of the Legal Services Board with a remit to provide independent advice to the Board about the interests of users of legal services.

**Mediation:** a form of dispute resolution which can help parties sort out a range of issues on relationship breakdown. An impartial third party to the dispute (the mediator) assists the parties in facilitating settlement.

**Position statement:** a short document outlining each party's current position in relation to the proceedings. It outlines what each party to the dispute wants the court to do, and why.

**Personal Support Unit (PSU):** the Personal Support Unit is a charity providing free practical and emotional support for litigants in person in civil and family cases and are available at certain courts. They do not provide legal advice.

**Private family law:** private family law cases are those brought by private individuals, most commonly in respect of children, or divorce or financial remedy; they can be distinguished from public family law cases, which are those brought by local authorities, for example care proceedings.

**Reserved legal activity:** specific legal services activities (for example, the exercise of rights of audience) that can only be undertaken by authorised individuals, or by those who are treated as exempt. An example of an exemption would be where a court grants rights of audience to an unauthorised person in relation to specific proceedings.

**Rights of audience:** the right to appear before and address a court. This includes the right to call and examine witnesses.

**Section 7 welfare report:** If the parties in a children case are not able to reach agreement, or if there are concerns about the welfare of children, the court may require a report on the child(ren)'s welfare. Such a report will most often be compiled by Cafcass.

**Section 25 factors:** The factors considered by the court when determining an application for financial remedies under s.25 of the Matrimonial Causes Act 1973.

**Society of Professional McKenzie Friends (SPMF):** self-regulatory trade organisation for fee-charging McKenzie Friends established in 2014

**Spousal periodical payments:** a type of financial order on divorce which provides for regular payments by one spouse to another. These can be for a fixed duration (e.g. five years), or for longer periods (e.g. during the lifetime of the payer). The sums involved may be nominal or substantial.

**Skeleton argument:** a document setting out the points a party wishes to make in respect of an appeal, and should include references to any documents and/or relevant law which they wish to rely on.

**Trusts of Land and Appointment of Trustees Act 1996 (TOLATA):** This statute gives the court powers to resolve disputes about the ownership of land and in private family cases, where appropriate, can be used by cohabitants to resolve their property disputes.

**Welfare checklist:** List of factors under s.1 Children Act 1989 to which the court must have regard when it considers any question relating to the upbringing of a child.

## Appendix 1

### Vignette used in freestanding interviews with McKenzie Friends

Caroline's former partner, Tony, currently sees their four year old son, Ben, for a few hours each weekend but he wants the child to stay with him three nights a week and has applied to the court for an order. Caroline is worried about Ben spending more time with his father because Tony is a habitual marijuana user and she does not think he is always capable of caring for a small child. He claims he no longer uses marijuana but Caroline says she has seen it in his flat recently. She is also worried that he owns two large dogs that Ben is afraid of. Caroline received a letter from Tony's solicitor asking her to attend a Mediation Information and Assessment Meeting. She tells you she refused to attend because she finds Tony aggressive and dominating and is afraid of conversations with him. She has now received an appointment to attend the court. She is extremely anxious and emotional about the hearing. She tells you that she has been getting some advice about her case from friends on Facebook and Netmums discussion forums but she seeks your advice on what will happen, what the relevant law is and what she needs to do.



